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No. 84-1459

In the Supreme Court of the United States

OCTOBER TERM, 1984

GUILLERMO HERNANDEZ-CARTAYA,
FRANCISCO J. FERNANDEZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 12, 1985

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE TRIAL COURT'S REFUSAL TO VOIR DIRE THE JURY ABOUT A NEWSPAPER ARTICLE CONCERNING THE PETITIONERS.

II. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF A NEW TRIAL ON THE BASIS OF AN ERRONEOUS JURY INSTRUCTION SIGNIFICANTLY MISSTATING THE GOVERNMENT'S BURDEN OF PROOF.

III. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S REFUSAL TO GRANT A MISTRIAL ON THE BASIS OF REMARKS MADE BY A CO-DEFENDANT WHICH CONSTITUTED COMMENT UPON THE PETITIONERS' FAILURE TO TESTIFY AT TRIAL.

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Guillermo Hernandez-Cartaya and Francisco J. Fernandez, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 5, 1984, and rendered by denial of rehearing on January 15, 1985.

OPINION BELOW

The decision of the Court of Appeals is reported at 747 F.2d 1390, and appears in the appendix hereto at A. 1. The District Court's orders denying post-trial motions appear at A. 15-16; neither are reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1984 (A. 17). A timely petition for rehearing was denied on January 15, 1985 (A. 18). This petition for certiorari was filed within 60 days of that date, under Rule 20.4 of the Rules of the Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

STATEMENT OF THE CASE

The facts of this case are not fairly presented in the opinion of the Court of Appeals; to the contrary, some of the most important facts are pointedly omitted from that opinion. Where appropriate, we will reference the Record on Appeal in the Court of Appeals ("R.") and the trial transcript ("Tr.").

The petitioners, both officers of WFC Corporation, a large financial organization headquartered in Miami, Florida, were both convicted of various tax violations (A.

5).[1] They seek reversal of those convictions on three bases, implicating their most fundamental constitutional rights.

I. The Newspaper Article. On the morning of the first full day of the jury's deliberation, an article appeared on the third page of the local section of the Miami Herald, entitled "Intrigue Fills 'Simple Tax Case'" (A. 19). Below this headline was a large insert quoting the trial judge to have said: "'The government says that Mr. Cartaya received a bonus of $50,000 and he didn't report it. If you believe he got it, then he's guilty.'—Judge Jose Gonzalez" (A. 19).[2] The body of the article discussed not only the trial, but also the WFC Corporation and petitioner Cartaya, providing substantial information which the jury had not heard. For example: "But the jurors, seven women and five men, know nothing about FBI, Drug Enforcement Administration, Public Safety Department and House Narcotics Subcommittee investigations of Hernandez [Cartaya] and the WFC Corp." (A. 20). The article mentioned rumors that "WFC was linked to the CIA or, alternatively, to Cuban dictator Fidel Castro; that WFC was involved in drug trafficking; that WFC was a large-scale swindle" (A. 22). It reported that Cartaya had been arrested in the Persian Gulf and in Miami; that an Arab country had charged "that a bank that was operated by WFC was missing more than $30 million"; that Cartaya had been charged "with conspiring

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1. A third co-defendant, Vicente Carrodeguas, was also an appellant in the Court of Appeals. *See* A. 1, 5. To our knowledge, he has not sought review by this Court.

2. This comment, of course, was an incorrect statement of the law; as the trial court had earlier charged the jury, conviction might only be predicated upon proof of knowing and willful failure to report the bonus (Tr. 3914, 3915, 3918, 3922, 3923, 3924, 3925, 3926, 3928, 3929, 3930, 3931, 3932, 3933, 3933-34).

to use a false passport to reenter the United States after his arrest in Ajman"; that "[t]he jurors know nothing about the Ajman Bank or the passport acquittal"; that the trial court had made the comment in the sub-headline with the preface " 'I don't see anything complicated' about the case . . ."; and finally, that the trial court had denied the defendants' motion to dismiss the conspiracy count with the comment that "there is substantial independent evidence of a conspiracy."

In other words, this article reported that the judge thought there was substantial evidence of a conspiracy, and believed that Cartaya was guilty for simply failing to report the bonus; and further informed the jury about rumors of involvement by WFC and Cartaya with the FBI, the Drug Enforcement Administration, a House narcotics subcommittee investigation, drug trafficking, and the loss of $30 million from an Arab bank.

The defendants requested that the trial court poll the jury to determine if anyone had read the article (Tr. 3968); the United States objected (Tr. 3968), and the trial court denied the motion (Tr. 3970). Both Fernandez and Cartaya assigned that ruling as error in their motions for new trial (R. 145, 154, 158-59), and both raised the argument in the Court of Appeals.

II. The Written Jury Charge. On the first day of its deliberation, the jury asked for a written copy of the trial court's charge (Tr. 3947-48). The trial court overruled the defendants' objections, and ordered the court reporter to type up the instructions (Tr. 3949, 3953). At 6:00 p.m. the jury sent back a note that "[w]e are waiting for instructions" (Tr. 3957), and the court called the jurors back into the courtroom and excused them until the following Monday (Tr. 3960-63). At some point there-

after, the instructions were typed up and delivered to the jury, with the defendants given no opportunity to review them first. They are found at Tr. 3903-35, also consecutively numbered 1-33.

Although the written charge does tell the jury that the government must prove guilt beyond a reasonable doubt (Tr. 3904), the very next sentence in the transcript (Tr. 3905) says the following (our emphasis): "Thus, while the Government's burden of proof is a strict or heavy burden it is not necessary that the defendants' guilt be proved beyond *all reasonable doubt.*" What the court intended to say, we think, was that the government need not prove guilt beyond "all doubt" or "all possible doubt." But the court reporter typed an instruction that the government need not prove guilt beyond all *reasonable* doubt. It is impossible to determine whether the trial court actually read the incorrect phrase to the jury, with the court reporter typing it accurately; or whether the trial court read the correct charge to the jury, with the court reporter typing it inaccurately. In any event, since no defendant was given the opportunity to review the written charge, there was no opportunity to discover the written error; only after the trial did the defendants review the written charges, discover the error, and assign it as one basis for a new trial (R. 145 at 1, R. 154 at 2). The trial court denied the motions (R. 158, 159, 161), and the petitioners raised the point before the Court of Appeals.

III. Closing Comment on the Petitioners' Failure to Take the Stand. There were six defendants at the trial, only one of whom, Henry Heitman, Jr., testified (Tr. 3193). He said that in early 1974, petitioner Cartaya gave him an envelope containing some cash, and also a slip of paper recording certain credits against Heitman's loans from

the company, and instructing him to destroy the slip of paper (Tr. 3199-3200). In 1976, he testified, he questioned petitioner Cartaya in a private conversation about one credit against his loan obligation of which he had not been aware, asking Cartaya if that credit would be recorded on Heitman's W-2 form for that year, and that Cartaya answered "Probably not" (Tr. 3229). Thus, among other things, Heitman testified to two private conversations with petitioner Cartaya alone, in which Cartaya had on one occasion given him a piece of paper telling him to destroy the evidence of credits against his loans, and on another had verbally informed him that WFC was not reporting another credit on Heitman's W-2. Both were asserted to be private conversations with Cartaya, and thus of course Cartaya was the only person in a position to contradict Heitman's testimony on this point.

At the close of the testimony, Heitman's counsel declared his express intention "to argue that there is only one person, and that is Mr. Cartaya, who can confirm what Mr. Heitman said was true. . . . There is only one man, and that was his conversation with Mr. Hernandez [Cartaya], and he is not a witness in this case and cannot be, and I think I have an absolute right to argue that, Your Honor" (Tr. 3450). Heitman's subjective intention, therefore, was crystal clear. The trial court, however, ruled that although Heitman was entitled to remind the jury that he had testified, he was forbidden to comment upon Cartaya's failure to testify (Tr. 3452-54).

In his closing argument, Heitman's counsel attempted to accomplish indirectly what he had been forbidden to do directly. He invited the jury to consider each defendant separately, to consider Heitman separately, and said that "[w]hen you do that, I ask you to bear in mind

that he explained to you in detail every facet of what he did, did not do, or did know or didn't know" (Tr. 3725). Thus, he expressly invited the jury to consider that Heitman was different *because* Heitman was the only defendant who had testified. He reminded the jury that Heitman had turned his "nose up to something that he doesn't want to do, even though it would have been money in his pocket" (Tr. 3735). He said that Mr. Heitman "didn't want to know" what was going on—that he must have said to himself " 'I know this is going on, but how do I know it?' " (Tr. 3736). He recalled Heitman's testimony that "Mr. Cartaya says, 'All right, this is what you owe the company. You don't have to pay it. I don't want the money' " (Tr. 3739). Pausing at that point, he said: "Now, just think about this: Here is a company that—well—here is a situation where he [Heitman] is in such close contact with these people in a big conspiracy, in a big scheme, in a big fraudulent situation where he handshakes with the president [Cartaya] and the president says, 'Forget it. You don't pay it. I forgive it. You don't have to pay it' " (Tr. 3739). Instead, Heitman's counsel insisted, Heitman reported the forgiveness as income on his taxes (Tr. 3739-41). And Heitman had told the jury about that: "You realize that if Mr. Heitman did not take the witness stand and tell you about this, you never would have heard about it" (Tr. 3741). Heitman's counsel concluded that "the evidence cannot and will not support a guilty verdict against Mr. Heitman. He is carved out. He is different. . . . He is different and his 1977 return shows he is different than anybody" (Tr. 3743). Thus, Heitman's counsel told the jury, "you have to carve him out and look at him alone, and when you do that, ladies and gentlemen, I just know as sure as shooting you are going to find him not guilty" (Tr. 3743). The jury did just that.

After the jury had been excused, Cartaya's counsel, noting that he had not wanted to interrupt Heitman's counsel's closing, formally objected to this argument as an indirect reference to Cartaya's refusal to testify, and moved for a mistrial (Tr. 3888-89). The trial court overruled the motion, and also the motion of another defendant that a mistrial should be granted because Heitman's closing argument had revealed a defense inconsistent with that of the other defendants (Tr. 3889).

The Court of Appeals affirmed the trial court on all three rulings. We will review its reasoning in the course of argument.

REASONS FOR GRANTING THE WRIT

I. The Newspaper Article. The Court of Appeals assigned three reasons for upholding the trial court's refusal to take even the simple step of asking the jurors whether they had read the offending newspaper article (A. 13). First, the court concluded that "[m]ost of the information contained in the article did not go beyond the record as developed at trial." Of course the question is not whether more of the article was innocent than prejudicial, but whether those prejudicial aspects of the article were sufficiently threatening to the defendants to warrant some inquiry. As a general proposition, inquiry is warranted, and the trial court abuses its discretion in failing to inquire, when the news account at issue supplies information beyond that known by the jury: "With hardly an exception, in the cases in which substantial prejudicial publicity during trial was found, the publicity involved 'information about

the defendant that would not be admissible before the jury or that was not in fact put before the jury in court.' "[3]

Thus, in a variety of contexts, the appellate courts have found inquiry essential whenever the material at issue might have informed the jury about aspects of the case of which it was not aware.[4] Likewise, inquiry has been held essential upon the revelation of information about the defendant of which the jury was unaware—information about other charges, other convictions, escape attempts, improper conduct like practicing medicine without a license, or general characterizations of criminal behavior.[5] And of

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3. *United States v. Jones*, 542 F.2d 186, 195 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976), *quoting United States v. Hyde*, 448 F.2d 815, 849 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972). *Accord, Marshall v. United States*, 360 U.S. 310, 312-13 (1959) (per curiam); *Goins v. McKeen*, 605 F.2d 947, 953 (6th Cir. 1979); *United States v. Crowell*, 586 F.2d 1020, 1024 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *United States v. Lord*, 565 F.2d 831, 837 (2nd Cir. 1977); *United States v. Perrotta*, 553 F.2d 247, 250 (1st Cir. 1977); *United States v. Pomponio*, 517 F.2d 460, 462-63 (4th Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States v. Accardo*, 298 F.2d 133, 136 (7th Cir. 1962).

4. *See, e.g., United States v. Attell*, 655 F.2d 703 (5th Cir. 1981) (reversal of prior conviction for same crime); *United States v. Richardson*, 651 F.2d 1251 (8th Cir. 1981) (shooting of prospective government witness); *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979) (pre-trial attempt to plead); *United States v. Herring*, 568 F.2d 1099 (5th Cir. 1978) (threats against government witness); *United States v. Lord*, 565 F.2d 831 (2nd Cir. 1977) (stabbing of government witness); *United States v. Perrotta*, 553 F.2d 247 (1st Cir. 1977) (exclusion of money as evidence); *United States ex rel. Greene v. State of New Jersey*, 519 F.2d 1356 (3rd Cir. 1975) (mid-trial attempt to plead); *United States v. Pomponio*, 517 F.2d 460 (4th Cir.), *cert. denied*, 423 U.S. 1015 (1975) (defendants' decision not to testify); *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969) (witnesses' invocation of Fifth Amendment); *Margoles v. United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969) (exclusion of real evidence at trial).

5. *See, e.g., Marshall v. United States*, 360 U.S. 310 (1959) (per curiam); *United States v. Trapnell*, 638 F.2d 1016 (7th Cir.

(Continued on following page)

course, inquiry is essential if the news reports at issue contain some comment upon or evaluation of the evidence already known by the jury—comment by the writer or by the participants in the trial about the strength of the government's case or the defense.[6]

In this case these criteria were satisfied. The article not only contained all sorts of things about the defendants and their company that were not known to the jury—allegations of drug trafficking and swindles and bank fraud and involvement with various investigatory organizations; in addition, it contained the comment by the trial judge that there was substantial independent evidence of conspiracy, and the erroneous comment that Cartaya would be guilty if he simply received some money and failed to report it, irrespective of his criminal intent. The question for the trial court—and for the appellate court upon *de novo* review[7]—was not whether "most" of the article repeated what the jury already knew, but whether those (substantial) portions which provided information unknown to the jury were sufficiently prejudicial to warrant inquiry.

Footnote continued—

1980); *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979); *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978); *United States v. Rhodes*, 556 F.2d 599 (1st Cir. 1977); *United States v. Pomponio, supra*, 517 F.2d 460; *United States v. Concepcion Cueto*, 515 F.2d 160 (1st Cir. 1975); *United States v. Hankish*, 502 F.2d 71 (4th Cir. 1974); *United States ex rel. Doggett v. Yeager*, 472 F.2d 229 (3rd Cir. 1973); *United States v. Kum Seng Seo*, 300 F.2d 623 (3rd Cir. 1962).

6. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 357 (1966); *Silverthorne v. United States*, 400 F.2d 627, 641-42 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971); *United States v. Narciso*, 446 F.2d 252, 319-20 (E.D. Mich. 1977).

7. *See Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *United States v. Jones*, 542 F.2d 186, 194-95 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); *United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 239 (3rd Cir. 1973).

Second, the Court of Appeals concluded that the "[o]ther information [in the article] was unrelated to the charges for which the appellants were being tried." That, of course, is precisely our point. As the cases already cited make clear, the revelation of unflattering information about the defendants, even if unrelated to the specific charges, can obviously prejudice the jury against them. We have provided already dozens of examples. And in the face of such material, at least when the defendant has requested a voir dire, the trial court has no discretion to decline to question the jury about such prejudicial extrinsic material.[8]

In other words, if the material at issue is potentially prejudicial—that is, if its character leaves no room for the trial court to exercise discretion in finding it innocent or harmless—then the reviewing court will not speculate as to whether any member of the jury has seen it; the mere *possibility* that such prejudicial material has reached the jury is sufficient to warrant a new trial in the absence of a voir dire.[9] In this context, the Court of Appeals' com-

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8. This requirement derives from §3.5(f) of the ABA Standards Relating to Fair Trial and Free Press (1968), providing that when the material at issue is potentially prejudicial to the jury, "the court may on its own motion or shall on motion of either party question each juror . . . ." *See Reinstein v. Superior Court Department of the Trial Court of Massachusetts*, 661 F.2d 255, 257 (1st Cir. 1981), *cert. dismissed*, 455 U.S. 995 (1982); *United States v. Hood*, 593 F.2d 293, 296 (8th Cir. 1979); *United States v. Herring, supra*, 568 F.2d at 1104, 1105; *United States v. Lord*, 565 F.2d 831, 838 (2nd Cir. 1977); *United States v. Perrotta*, 553 F.2d 247, 249 (1st Cir. 1977); *United States v. Pomponio, supra*, 517 F.2d at 463.

9. *See United States v. Attell*, 655 F.2d 703, 706 (5th Cir. 1981); *United States v. Perrotta, supra*, 553 F.2d at 251, *citing Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *United States v. Herring, supra*, 568 F.2d at 1103-04 ("there is nothing on the record before us to indicate that the defendant's guilt was *not* impermissibly prejudged"); *United States ex rel. Greene v. State of New Jersey*, 519 F.2d 1356, 1357 (3rd Cir. 1975); *United States v. Hankish*, 502 F.2d 71, 77 (4th Cir. 1974).

ment—that the trial court's ruling should be upheld because most of the material was "unrelated to the charges"—is difficult to comprehend. In the overwhelming majority of cases in this area, that is precisely the reason for requiring some voir dire.

Third and finally, the Court of Appeals observed that the trial court generally instructed the jury not to read about the case, and found that a sufficient basis for upholding the ruling. But these cases arise precisely because juries repeatedly ignore such boilerplate instructions and expose themselves to prejudicial material all the time; for this reason, the overwhelming majority rule is that such general instructions are insufficient.[10] That caution is especially appropriate in this case, because here the trial court told the jury only not to read anything about "these proceedings" or about "the trial" (Tr. 899, 1210, 1505, 1861, 2629, 2938, 3307, 3887, 3943, 3964, 3971, 4000, 4007). Even a conscientious juror could have obeyed that instruction and still have read this article about the defendants, their company, and unrelated accusations against them.[11]

We submit that the trial court manifestly abused its discretion in failing to recognize the inherently prejudicial nature of this newspaper article, and thus erred in failing to take the simple step of questioning the jurors about whether or not they had seen it. The Court of Appeals, fail-

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10. *See, e.g., United States v. Herring, supra,* 568 F.2d at 1104; *United States v. Williams,* 568 F.2d 464, 471 (5th Cir. 1978); *United States v. Lord,* 565 F.2d 831, 838 (2nd Cir. 1977); *United States v. Perrotta,* 553 F.2d 247, 251 (1st Cir. 1977); *United States v. Pomponio, supra,* 517 F.2d at 463; *United States v. Schrimsher,* 493 F.2d 848, 854 (5th Cir. 1974).

11. *See United States v. Herring, supra,* 568 F.2d at 1101 n.6; *United States v. Rhodes,* 556 F.2d 599, 601 (1st Cir. 1977), *citing DeRosier v. United States,* 407 F.2d 959, 963 (8th Cir. 1969), *and Kissell v. Westinghouse Electric Corp.,* 367 F.2d 375 (1st Cir. 1966). *See generally Sheppard v. Maxwell,* 384 U.S. 333, 353 (1966).

ing to inform the reader of the tremendously-prejudicial material contained in the article, upheld the trial court's ruling on three bases which have overwhelmingly been rejected by almost every other court to consider this issue. It thus failed in its supervisory responsibility to assure the sanctity of our federal jury system.[12]

II. The Jury Instruction. As we have noted, the written jury instructions provided to the jury contained the patently-erroneous charge that "it is not necessary that the defendants' guilt be proved beyond all reasonable doubt" (Tr. 3905). It is well-settled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[13] And "[a] defendant is entitled to have a jury apprised of this standard . . . ."[14] Nor can there be any question that the trial court's instruction was erroneous, because it plainly allowed the jury to convict despite some reasonable doubt: "[I]t was error not to give an instruction adequately apprising the jury of its duty to acquit should the case leave them with any reasonable doubt on the issue."[15]

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12. *See Murphy v. Florida*, 421 U.S. 794 (1975); *Marshall v. United States*, 360 U.S. 310, 313 (1959); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969).

13. *In Re Winship*, 397 U.S. 358, 364 (1970). *Accord, Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *Taylor v. Kentucky*, 436 U.S. 478 (1978).

14. *United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974). *Accord, Dunn v. Perrin*, 570 F.2d 21, 25 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978).

15. *United States v. Scott*, 529 F.2d 338, 340 (D.C. Cir. 1975). *See Dunn v. Perrin*, 570 F.2d 21 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978) (overturning instruction that a reasonable doubt is one explicable by a good or sufficient reason, since such a charge "suggested that a doubt based on reason was not enough to acquit . . . ."); *Bumpus v. Gunter*, 452 F. Supp.

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The Court of Appeals acknowledged the mistake, but noted that the charges must be viewed as a whole, and that the trial court correctly stated the burden of proof at other times (A. 7-8). That was not enough to overcome the inherent prejudice of the manifest error in this crucial area.[16] The Court of Appeals also commented that the defendants had failed to object to the charge when it was given orally. But there is absolutely no evidence of record that the trial court's oral charge misstated the burden of proof. As the United States itself insisted in its appellee's brief (p. 48), it is equally possible that the court reporter simply typed it incorrectly, and the defendants' central constitutional right should not depend upon speculation. In any event, a misstatement of the burden of proof in a criminal case is certainly fundamental error.[17] Nor can it possibly be said that the error was harmless beyond a reasonable doubt.[18] If ever there was plain error, this was it.

Footnote continued—

1060 (D. Mass. 1978) (overturning instruction that jurors must have defensible reasons for acquittal). In contrast, it is not error to instruct the jury that the government need not prove guilt beyond all possible doubt. *United States v Jacobson*, 578 F.2d 863, 866 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978); *Friedman v. United States*, 381 F.2d 155, 160 (8th Cir. 1967).

16. *See United States v. Panter*, 688 F.2d 268, 270 (5th Cir. 1982); *United States v. Grote*, 632 F.2d 387 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); *United States v. Pine*, 609 F.2d 106, 108 (3rd Cir. 1979); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977); *Notaro v. United States*, 363 F.2d 169, 175 (9th Cir. 1966).

17. *See generally Screws v. United States*, 325 U.S. 91 1945); *Findley v. United States*, 362 F.2d 921, 922 (10th Cir. 1966), *overruled on other grounds*, 564 F.2d 934 (10th Cir. 1977).

18. *See Chapman v. California*, 386 U.S. 18, 24 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977).

III. The Co-Defendant's Closing Argument. We have reviewed the co-defendant's closing argument, in which he attempted to distinguish himself from the other defendants on the ground that he had taken the stand and told his story; and in which he emphasized that this story focused in large measure upon private conversations with petitioner Cartaya which only petitioner Cartaya was in a position to affirm or rebut. The Court of Appeals' opinion acknowledges co-defendant Heitman's manifest subjective intention "to point out to the jury that only Hernandez-Cartaya could deny the verity of Heitman's testimony and Hernandez-Cartaya had not taken the witness stand" (A. 10). But the Court of Appeals' opinion finds only one passage from the closing argument which constituted an indirect way of making that point—the passage in which Heitman's counsel told the jury that his client was different, and in the process suggested that Heitman was different because he had taken the stand. In our view that one example is enough, but there are other examples, ignored by the Court of Appeals, in which Heitman's counsel focused repeatedly upon his testimony about private conversations with Cartaya.

We acknowledge that a co-defendant has the right to remind the jury that he has testified. He does not, however, have the right to emphasize that a co-defendant has not testified by emphasizing his own testimony about private conversations with that co-defendant. In a variety of contexts, the courts have held that such comment is impermissible if it constitutes a challenge to produce evidence which *only* the co-defendant could have produced.[19]

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19. *See, e.g., Davis v. United States*, 357 F.2d 438, 441 (5th Cir.), *cert. denied*, 385 U.S. 927 (1966); *Smith v. United States*, 268 F.2d 416, 421 (9th Cir. 1959); *Langford v. United States*, 178 F.2d 48, 55 (9th Cir. 1949), *cert. denied*, 339 U.S. 938 (1950); *Linden v. United States*, 296 F. 104 (3rd Cir. 1924).

The co-defendant's comments under such circumstances would "naturally and necessarily" be taken by the jury as a comment upon the defendant's failure to testify, since only the defendant could have provided the challenged evidence.[20] And in this case a second standard of review is satisfied—the subjective standard—requiring reversal if the remark discloses a "manifest intention" of calling the jury's attention to the defendant's failure to take the stand.[21]

Of course, one can hardly blame Heitman; his "right to confrontation allows him to invoke every inference from [his co-defendant's] absence from the stand." *De Luna v. United States*, 308 F.2d 140, 143 (5th Cir. 1962). If that right could not be accommodated to the other defendants' right to be free of comment upon their failure to take the stand, the trial court was required to sever the cases: "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."[22] From

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20. *See United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978) (per curiam); *United States v. Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977); *United States v. Ward*, 552 F.2d 1080, 1083 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977); *Samuels v. United States*, 398 F.2d 964, 968 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

21. *See United States v. Aguiar*, 610 F.2d 1296, 1302 (5th Cir. 1980), *cert. denied sub nom. Morejon-Pacheco v. United States*, 449 U.S. 827 (1981); *United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978) (per curiam).

22. *De Luna v. United States*, *supra*, 308 F.2d at 141. *Accord*, *United States v. Aguiar*, *supra*, 610 F.2d at 1301; *United States v. Nakaladski*, 481 F.2d 289, 302 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States v. Johnson*, 478 F.2d 1129, 1131-32 (5th Cir. 1973); *United States v. Robinson*, 139 U.S. App. D.C. 286, 432 F.2d 1348, 1351 (1970). In this case, several of the defendants moved for severance of their cases both before and after the offending remarks, and in addition moved

(Continued on following page)

the petitioners' perspective, the trial court was either required to sever the cases, or to forbid Heitman to exercise his right to comment upon their failure to take the stand. He did neither, and thus committed reversible error. That error struck at the heart of the petitioners' right to remain silent, and as this Court has noted, it would ignore the "development and purpose" of the privilege to apply it "narrowly or begrudgingly—to treat it as an historic relic at most merely to be tolerated . . . ." *Quinn v. United States*, 349 U.S. 155, 162 (1950). Nor is such prejudice in any sense cured by a general jury instruction affirming the defendant's right to remain silent.[23]

In isolating only one part of the closing argument, and finding it sufficiently ambiguous to survive constitutional scrutiny, the Court of Appeals ignored the central prejudice of that closing argument—its reminder that Heitman had testified about private conversations with Cartaya which only Cartaya could have contradicted. The manifest intention of those comments was to emphasize Cartaya's failure to testify; their objective effect, naturally and necessarily, was to call the jury's attention to that failure to testify.

The three errors in this case struck at the heart of the petitioners' constitutional and federal rights. They denied

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Footnote continued—

for a mistrial after those remarks (Tr. 3888-89). And even if none of the defendants had moved for severance, "the trial court's duty to sever when prejudice appears, continues throughout the trial." *United States v. Crawford*, 581 F.2d 489, 492 (5th Cir. 1978), *citing Shaffer v. United States*, 362 U.S. 511, 516 (1960). *See De Luna v. United States, supra*, 308 F.2d 140.

23. *De Luna v. United States, supra*, 308 F.2d at 154-55, *citing Krulewitch v. United States*, 336 U.S. 440 (1949). *Accord, Stewart v. United States*, 366 U.S. 1 (1961); *Wilson v. United States*, 149 U.S. 60 (1893), *cited in Smith v. United States*, 268 F.2d 416, 420 n.2 (9th Cir. 1959).

them the right to trial by jury based exclusively on the evidence presented, free of the extrinsic influence of news accounts. They denied them the right to demand of the government proof beyond a reasonable doubt. And they denied them the unpunished exercise of their right to remain silent. Any one of these errors would have required reversal by the Court of Appeals. All three together compel reversal.

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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By: JOEL S. PERWIN

March 12, 1985

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Vicente CARRODEGUAS, Guillermo Hernandez-Cartaya, Francisco J. Fernandez,
Defendants-Appellants.

No. 81-6204.

United States Court of Appeals,
Eleventh Circuit.

Dec. 5, 1984.

Defendants were convicted in the United States District Court for the Southern District of Florida, José A. Gonzalez, Jr., J., of conspiring to defraud the United States in ascertainment, computation and collection of income and employment taxes and other tax offenses, and they appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) although verbal jury instruction mistakenly required that defendants' guilt be proved beyond all possible doubt, trial court's instructions, when considered as a whole, did not mislead jury as to Government's burden of proving defendants' guilt beyond all reasonable doubt, and (2) remarks made by codefendant's attorney, which were clearly intended to distinguish conduct of codefendant from that of defendants and to point out that Government's evidence and cross-examination had failed to refute co-

defendant's testimony, and which may have been intended to indirectly highlight to jury the failure of the other defendants to take the witness stand, did not constitute an improper comment on defendants' failure to testify.

Affirmed.

1. Indictment and Information (Key) 10.1(2)

Defendants, who alleged that grand jury which handed down the indictments had been drawn from a jury venire lacking sufficient numbers of Hispanics to satisfy fair cross-section requirement of Sixth Amendment and Jury Selection and Service Act but who did not produce reliable data showing the number of Hispanics living in the relevant community, failed to sustain the burden of proving a violation of fair cross-section requirement. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 1861 et seq.

2. Criminal Law (Key) 822(13)

Although verbal jury instruction mistakenly required that defendants' guilt be proved beyond all possible doubt, trial court's instructions, when considered as a whole, did not mislead jury as to Government's burden of proving defendants' guilt beyond all reasonable doubt.

3. Criminal Law (Key) 721(3)

Remarks made by codefendant's attorney, which were clearly intended to distinguish conduct of codefendant from that of defendants and to point out that Government's evidence and cross-examination had failed to refute codefendant's testimony, and which may have been intended to indirectly highlight to jury the failure of the other defendants to take the witness stand, did not constitute an improper comment on defendants' failure to testify.

4. Criminal Law (Key) 721(1)

In determining whether a particular statement constitutes an improper comment on defendant's failure to testify, test is whether the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on failure of accused to testify; court cannot find that counsel manifestly intended to comment on defendant's failure to testify if some other explanation for his remark is equally plausible.

5. Criminal Law (Key) 721(1)

In deciding whether a jury would naturally and necessarily take a statement to be a comment on a defendant's failure to testify, question is not whether jury possibly or even probably would view the challenged remark in that manner but whether the jury necessarily would have done so.

6. Criminal Law (Key) 868

Determination of whether newspaper article published during jury deliberations was so prejudicial as to require a voir dire of the jurors is within sound discretion of trial court.

7. Criminal Law (Key) 868

Trial court did not abuse its discretion in refusing to voir dire jury about a newspaper article published during its deliberations where most of the information contained in the article did not go beyond the record as developed at trial and where other information was unrelated to the charges for which defendants were being tried.

8. Indictment and Information (Key) 191

Violation of section of Internal Revenue Code prohibiting the filing of fraudulent returns was not a lesser included offense of Code section prohibiting the making and subscribing of income tax forms not believed to be true and correct. 26 U.S.C.A. §§ 7206(1), 7207.

9. Internal Revenue (Key) 5303

Fact that defendant's name was signed to the tax returns was prima facie evidence in prosecution for income tax violations that he actually signed them. 26 U.S.C.A. § 6064.

10. Conspiracy (Key) 47(9)

Evidence was sufficient to support defendant's convictions for conspiring to defraud United States in ascertainment, computation, and collection of income and employment taxes as well as other tax violations. 18 U.S.C.A. § 371; 26 U.S.C.A. § 7206(1).

Jose E. Martinez, English, McCaughan & O'Bryan, Coral Gables, Fla., for Carrodeguas.

William A. Meadows, Jr., South Miami, Fla., Robert C. Josefsberg, Joel S. Perwin, Miami, Fla., for Hernandez-Cartaya.

Irwin J. Block, Fine, Jacobson, Block, Klein, Colan & Simon, P.A., Miami, Fla., for Fernandez.

Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Chief, Appellate Section, Robert E. Lindsay, Terry L. Fredricks, Tax Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Appellants Vicente Carrodeguas, Guillermo Hernandez-Cartaya, and Francisco J. Fernandez were officers of WFC Corporation, a large financial organization headquartered in Miami, Florida. This company was engaged primarily in the business of facilitating international loans. Between 1973 and 1978, the company's operations were extremely successful, and each year the appellants agreed to award sizeable cash bonuses to themselves as well as other key officers. The appellants further agreed and instructed the recipients that these bonuses were not to be reported as additional compensation on their income tax returns. The appellants then arranged for the corporation's accounting records to conceal the payment of these bonuses, which totalled well over $100,000 each year.

The appellants were each convicted on one count of conspiring to defraud the United States in the ascertainment, computation, and collection of income and employment taxes. 18 U.S.C.A. § 371. In addition, Carrodeguas was convicted on six counts of violating 26 U.S.C.A. § 7206(1) (making and subscribing income tax forms not believed to be true and correct) and four counts of violating 26 U.S.C.A. § 7206(2) (assisting in the preparation of income tax return forms that were false and fraudulent). Hernandez-Cartaya was also convicted on three counts of violating 26 U.S.C.A. § 7206(1) and four counts of violating 26 U.S.C.A. § 7206(2). Fernandez was also convicted on three counts of violating 26 U.S.C.A. § 7206(1). We affirm the convictions of each appellant on every count.

The appellants join in contesting three issues on appeal. We shall address each of these in turn, before discussing the remaining issues that Hernandez-Cartaya and Fernandez raise separately.

[1] First, the appellants challange the denial of motions to dismiss their criminal indictments. These motions were based on the contention that the grand jury which handed down the indictments had been drawn from a jury venire lacking sufficient numbers of Hispanics to satisfy the fair cross-section requirement of the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C.A. § 1861 *et seq.* *See Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

The denial of the appellants' motions occurred after a special evidentiary hearing in a separate district court combining similar motions made in thirteen other criminal trials. *United States v. Cabrera-Sarmiento,* 533 F.Supp. 799 (S.D.Fla.1982). The district court rejected these challenges because the movants failed to sustain their burden of proving a violation of the fair cross-section requirement, as defined in *Duren v. Missouri,* 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979). The movants had not produced reliable data showing the number of Hispanics living in the relevant community. After hearing an appeal from convictions entered in one of the combined criminal cases, a panel from this Court recently affirmed the district court's order denying the motions to dismiss. *United States v. Esle,* 743 F.2d 1465 at 1469-76 (11th Cir.1984) (per curiam). We follow this binding precedent and likewise affirm the district court's denial of the appellants' motions to dismiss their indictments.

[2] The second issue raised by all appellants concerns the trial court's instructions to the jury. Before

charging the jury, the court gave counsel for each appellant a written copy of its proposed instructions. These instructions included a correct charge as to the government's burden of proving guilt beyond a reasonable doubt. After ruling on all objections and incorporating the accepted changes, the court verbally charged the jury in accordance with the written instructions, except for a one-word mistake the appellants now claim constitutes reversible error. From the trial transcript it appears the judge instructed the jury:

> [E]very defendant is presumed by law to be innocent. The law does not require the defendant to prove his innocence. . . .
>
> The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so, you must acquit him.
>
> Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendants' guilt be proved beyond all *reasonable* doubt. It is only required that the Government's proof exclude any reasonable doubt concerning the defendants' guilt. (emphasis added)

The transcript differs from the proposed written instructions which correctly stated at this point that it was not necessary that the defendants' guilt be proved beyond all *possible* doubt. None of the appellants objected further when, after completing the charge, the judge asked if there were objections to the instructions as given.

We acknowledge the mistake and note the inconsistency between its language and that of the preceding and following sentences in the given instructions. Yet we do not review the propriety of particular language in the

abstract. Rather, we look to the adequacy of the charge as a whole. *United States v. Park,* 421 U.S. 658, 674-76, 95 S.Ct. 1903, 1912-14, 44 L.Ed.2d 489 (1975); *United States v. Pool,* 660 F.2d 547, 558 (11th Cir.1981) (Unit B). Reading the entire charge satisfies us that the jury was adequately instructed as to the government's burden of proving guilt beyond a reasonable doubt. The trial judge directed the jury to follow the instructions as a whole and, in at least nineteen specific instances, correctly stated that in order to convict a defendant on a particular charge the jury would have to find him guilty beyond a reasonable doubt. In fact, with regard to the three federal statutes the appellants were found to have violated, the specific instructions were that the evidence for each count must show guilt beyond a reasonable doubt. Viewed as a whole, then, the charge fairly advised the jury that guilt could only be imposed absent all reasonable doubt.

In *United States v. Vasilaky,* 168 F.2d 191 (2d Cir.1948), the Second Circuit reviewed a jury charge in which, after stating three times in the course of the instruction that guilt must be proved "beyond a reasonable doubt," the trial judge summarized: "If the Government in this case has failed to establish [its ownership of the property allegedly stolen] *by a fair preponderance of the evidence,* then of course that ends the case, and you will direct a verdict for the defendants." *Id.* at 192. Later in the instruction, the judge again referred to the beyond-a-reasonable-doubt standard. On appeal, the Second Circuit characterized the judge's error as "patently a slip-of-the-tongue mistake" which would have been corrected had the defendant's counsel objected. Instead, the defendant's attorney had stated after the charge that "there is no exception or request to charge." *Id.* The court concluded that the single slip did not mislead the jury and affirmed the appellant's conviction.

This Court has in the past endorsed the *Vasilaky* holding and affirmed a criminal conviction where a trial judge apparently stated that the appellant had conceded an important element of the crime when in fact the appellant had not. *Hoover v. United States,* 358 F.2d 87, 88 (5th Cir. 1966). Again, the appellant's counsel did not object to the jury charge as made. The *Hoover* Court reasoned: "[I]t can hardly be argued that the jury was affected to the detriment of the appellant by this charge when it was obvious that none of the experienced trial lawyers representing the appellant were so affected." *Id.* This comment is equally relevant to the appellants in the present appeal who similarly did not notice the mistake and did not, when asked by the court immediately after it verbally instructed the jury, register any objections to this portion of the instructions. We hold that the trial court's instructions, when considered as a whole, did not mislead the jury as to the government's burden of proving the appellants' guilt beyond all reasonable doubt.

[3] The third issue raised by each appellant involves the trial court's refusal to declare a mistrial on motions the appellants made after closing arguments were completed. The basis for these motions was an allegation that the closing argument by counsel for co-defendant Henry Heitman, Jr., whom the jury eventually acquitted, improperly commented upon the appellants' failure to testify.

Heitman was the only defendant to take the stand during the trial. His testimony concerned conversations he had with Hernandez-Cartaya, in which Heitman expressed his desire not to receive the annual bonuses in the form of cash, but rather as non-taxable business perquisites or personal loans. Following Heitman's testimony, the appellants submitted a motion in limine seeking to restrict Heitman's counsel from referring to the failure

of other defendants to testify. Heitman's attorney disagreed, arguing he should be able to point out to the jury that only Hernandez-Cartaya could deny the verity of Heitman's testimony and Hernandez-Cartaya had not taken the witness stand. Under the trial court's ruling, Heitman's attorney could comment on the fact that Heitman had testified, the content of Heitman's testimony, and failure of the government to rebut this testimony. However, he could not comment—either "directly" or "indirectly to the degree . . . that it might prejudice the other Defendants"—on their decision not to testify. The trial judge refused to permit any reference to Hernandez-Cartaya as the only person who could refute Heitman's testimony because it would seriously prejudice Hernandez-Cartaya's right not to testify.

In his closing argument, Heitman's attorney did not comment directly on the appellants' failure to testify. Instead, he attempted to distinguish Heitman from the other defendants as one who chose not to accept the annual bonuses in an illegal form. The appellants charge that, in referring to Heitman's testimony and characterizing him as different from the other defendants, the attorney indirectly highlighted to the jury the failure of the other defendants to take the witness stand. After a careful study of the closing argument, however, we conclude that in only one instance did Heitman's attorney even come close to commenting indirectly on the appellants' failure to testify at trial, and in this instance the statement was not of such character that the jury would take it to be a comment on the appellants' failure to testify.

Midway through his closing argument, Heitman's attorney stated:

> I suppose we can look at Mr. Heitman—and I don't know how you are going to do this, ladies and

gentlemen, I don't know how you are going to do this—His Honor is going to tell you during the course of the instructions that you must under your oath, separate each defendant and consider him on trial as though he were on trial alone, all by himself.

Now, that will take some difficult mental gymnastics because somehow or other you are going to have to visualize him in this corner all alone where you consider his guilt or innocence.

When you do that, I ask you to bear in mind that he explained to you in detail every facet of what he did, did not do, or did know or didn't know.

He subjected himself to the rigors of the power of our government's cross examination with all the help [the government] has . . ., with all the documents [it] has, with all the help that [it] can be given, and responded, . . . "[T]hat's just the way it was; that is true."

[4, 5] We have previously stated: "A mere favorable comment upon the fact that one of several co-defendants testified does not involve the same potential for prejudice as an adverse comment by counsel upon the failure to testify of the other co-defendant." *United States v. Hodges*, 502 F.2d 586, 587 (5th Cir.1974). In determining whether a particular statement constitutes an improper comment on a defendant's failure to testify, the "test . . . is whether or not the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Wilson*, 500 F.2d 715, 721 (5th Cir.1974), *cert. denied*, 420 U.S. 977, 95 S.Ct. 1403, 43 L.Ed.2d 658 (1975). The Court cannot find that counsel "manifestly intended to comment on the defendant's failure to testify,

if some other explanation for his remark is equally plausible." *United States v. Rochan,* 563 F.2d 1246, 1249 (5th Cir.1977). Moreover, in deciding whether a jury would naturally and necessarily take the statement to be a comment on the defendant's failure to testify, "the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury *necessarily* would have done so." *Williams v. Wainwright,* 673 F.2d 1182, 1185 (11th Cir.1982) (emphasis in original). The burden of proof is on the appellants to show, under these principles, that Heitman's attorney manifestly intended to comment upon their failure to testify or that the jury necessarily construed his closing argument as a comment upon their failure to testify. *United States v. Jones,* 648 F.2d 215, 218 (5th Cir.1981) (Unit B). Because the remarks made by Heitman's attorney were clearly intended to point out that Heitman did not wish to receive cash bonuses and that the government's evidence and cross examination had failed to refute Heitman's testimony, we do not find the remarks improper. They were not of such character that the jury would necessarily take them to be a comment on the appellants' refusal to testify.

[6, 7] Three remaining issues are raised separately. Citing *United States v. Herring,* 568 F.2d 1099 (5th Cir. 1978), Hernandez-Cartaya and Fernandez charge that the trial judge erred in refusing to voir dire the jury about a newspaper article published during its deliberations. The appellants claim the article contained prejudicial material about the defendants and improper comments attributed to the judge. The determination of whether this article was so prejudicial as to require a voir dire of the jurors is within the sound discretion of the trial court. *United States v. Goodman,* 605 F.2d 870, 882 (5th Cir.1979). After re-

viewing the evidence and the content of the article, we affirm the trial court's exercise of its discretion. Most of the information contained in the article did not go beyond the record as developed at trial. Other information was unrelated to the charges for which the appellants were being tried. Further, the likelihood that the information reached the jurors was small, especially in light of the trial court's specific instructions to the jurors not to read or listen to media accounts concerning the trial. We will not presume that the jurors disregarded these instructions. *Gordon v. United States,* 438 F.2d 858, 873-74 (5th Cir.), *cert. denied,* 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971).

[8, 9] Fernandez contends the trial court erred in refusing to instruct the jury that a violation of 26 U.S.C.A. § 7207 is a lesser included offense of 26 U.S.C.A. § 7206(1). This contention is foreclosed by the decisions of this Court in *Escobar v. United States,* 388 F.2d 661, 666 (5th Cir. 1967), *cert. denied,* 390 U.S. 1024, 88 S.Ct. 1411, 20 L.Ed.2d 282 (1968), and *United States v. Gaines,* 690 F.2d 849, 856 (11th Cir.1982), which note the only difference between the two statutes is the requirement in Section 7206 that a false statement be made "under the penalties of perjury." Like the federal tax returns filed in these precedents, the returns filed by Fernandez contained standard perjury clauses. As for Fernandez's claim that no evidence was presented showing he actually signed the returns the government introduced as evidence, which he conceded were true and correct copies of returns on file with the Internal Revenue Service, the fact that Fernandez's name was signed to the returns is *prima facie* evidence that he actually signed them. 26 U.S.C.A. § 6064. Fernandez did not offer evidence rebutting this presumption.

[10] Finally, Fernandez claims that the evidence presented was insufficient to support his convictions. The test for reviewing the sufficiency of evidence to support a conviction is whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the government, a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.) (Unit B), *cert. granted*, 459 U.S. 1034, 103 S.Ct. 444, 74 L.Ed.2d 600 (1982). After reviewing the record, we conclude that sufficient evidence exists against Fernandez to support his convictions.

The judgments entered by the trial court are AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 81-23-CR-JAG

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUILLERMO HERNANDEZ CARTAYA, et al.,
Defendants.

ORDER

THIS CAUSE has come before the Court upon the Defendant's, GUILLERMO HERNANDEZ CARTAYA, Motion For New Trial. The Court has considered the Motion, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that the Defendant's Motion for New Trial be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of October, 1981.

/s/ Jose A. Gonzalez, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 81-23-CR-JAG

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCISCO J. FERNANDEZ, et al.,
Defendants.

ORDER

THIS CAUSE has come before the Court upon certain pending Motions of the Defendant, FRANCISCO J. FERNANDEZ. The Court has considered the Motions and, being otherwise duly advised, it is

ORDERED AND ADJUDGED as follows:

1) That the Defendant's Motion for New Trial and Adoption of Co-Defendant's Motion for New Trial be and the same are hereby DENIED.

2) That the Defendant's Motion for Judgment of Acquittal be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of October, 1981.

/s/ Jose A. Gonzalez, Jr.
United States District Judge

(Filed December 5, 1984)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6204

D.C. Docket No. 81-23
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICENTE CARRODEGUAS, GUILLERMO HERNANDEZ-CARTAYA, FRANCISCO J. FERNANDEZ,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby, AFFIRMED.

Entered: December 5, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/ (Illegible)
Deputy Clerk

ISSUED AS MANDATE: Feb. 5, 1985 (AS TO HERNANDEZ-CARTAYA and FERNANDEZ ONLY)

(Filed February 15, 1985)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6204

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICENTE CARRODEGUAS, GUILLERMO HERNANDEZ-CARTAYA, FRANCISCO J. FERNANDEZ,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITIONS FOR REHEARING

(January 15, 1985)

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

Entered for the Court:

/s/ (Illegible)
United States Circuit Judge

Friday, July 3, 1981/The Miami Herald 3C

INTRIGUE FILLS 'SIMPLE TAX CASE'

'The government says that Mr. Cartaya received a bonus of $50,000 and he didn't report it. If you believe he got it, then he's guilty.'
Judge Jose Gonzalez

By AL MESSERSCHMIDT
Herald Staff Writer

To the 12 jurors sitting in the blue chairs in the federal courtroom, the trial of Guillermo Hernandez Cartaya and five other officials of the Coral Gables-based WFC Corp. is a simple tax case.

The hints of intrigue — fleeting comments about the CIA, bank frauds phony passports, political payoffs — surface abruptly and vanish quickly during testimony of government witnesses.

After hearing nearly three weeks of testimony, the jurors got the case at 10:30 a.m. Thursday, deliberated until 6 p.m. and went home for the weekend.

During the course of the day they asked three questions: Could they have a transcript of all the testimony? Could they have a copy of the judge's instructions on the tax law? Could they have a jar of instant coffee? Judge answered "no" to the first, "yes" to the other two.

The jurors know the intimate details of the alleged scheme to pay non-taxed, cash bonuses to top-ranking WFC officials. The jurors know who stuffed the cash envelopes, who prepared the bonuses list, who withdrew the cash from local banks.

Details don't surface

But the jurors, seven women and five men, know nothing about FBI, Drug Enforcement Administration, Public Safety Department and House narcotics subcommittee investigations of Hernandez and the WFC Corp.

"We're not here to try the business practices of WFC," Judge Jose Gonzalez has told the eight attorneys in the courtroom.

"I don't see anything complicated" about the case, Gonzalez said last Friday after the jury left the courtroom. "The government says that Mr. Cartaya received a bonus of $50,000 and he didn't report it. If you believe he got it, then he's guilty."

The six former WFC officials are charged with receiving nearly $1 million in cash bonuses from 1973 to 1978 and with failing to pay income taxes on the money.

Hernandez, a Bay of Pigs veteran, is charged with receiving bonuses of $50,000 to $80,000 a year. The firm paid between $150,000 and $400,000 in cash bonuses per year, according to the testimony.

The trial has pitted the same men who once shared the privileges of executive life at WFC — expense accounts, private loans, luxury cars and big salaries — against each other.

Sitting with Hernandez as defendants are WFC chief financial officer Vincente Carrodeguas; executive vice president Francisco J. Fernandez; banking officer Henry G. Coryat; vice president Henry N. Heitman and vice president Lance J. Cunha.

Sitting in the witness chair have been former WFC officials David Masnata, R. Peter Kelly, Fernando A. Capablanca and Carlos Fernandez.

Indictment tracked

Using the testimony of the former WFC officials and nearly 160 exhibits, Assistant U.S. Attorney Sam Strother has ploddingly tracked the 37-count indictment that charges the six defendants with tax conspiracy and evasion.

Strother's witnesses have testified that the bonus list was first prepared by Hernandez in 1973. Some bonuses were credits against loans that WFC officials obtained from the firm. Other bonuses were cash, mostly $100 bills, stuffed in white envelopes.

With the bonuses came summary financial statements. The statements, according to the witnesses, bore the warning "destroy after reading."

The 1975 bonuses were disguised in WFC records as an $82,830 payment for legal services to a Bogota law firm. The address on the law firm's letterhead is a pizza parlor, according to testimony.

Hernandez's bonus of $80,000 was transferred through a Panama bank to a WFC subsidiary in the name of Hernandez's former wife, according to the testimony.

Charges upheld

Gonzalez ruled last Friday that "there is substantial independent evidence of a conspiracy." He refused to dismiss the conspiracy charges after Strother ended prosecution testimony.

The defense questioning of Strother's witnesses has provided the only glimpse inside the mysterious banking conglomerate that once operated from Ponce de Leon Boulevard in Coral Gables.

Hernandez was one of three men who formed WFC as an international banking firm in 1971. By the mid-

1970s, the firm's loan portfolio was hundreds of millions of dollars.

Defense Attorney Irwin Block uses the figure $500 million.

Hernandez controlled three Miami banks. WFC subsidiaries operated banks in Colombia, the Persian Gulf, Panama and Costa Rica.

With the build-up of business came the rumors that: WFC was linked to the CIA or, alternately, to Cuban dictator Fidel Castro; that WFC was involved in drug trafficking; that WFC was a large-scale swindle.

No criminal charges were filed, although a task force of DEA and FBI agents were assigned to a wide-range investigation.

But Hernandez was arrested, first in the Persian Gulf, then in Miami. Officials in the Arab country charged that a bank that was operated by WFC was missing more than $30 million. U.S. officials charged Hernandez with conspiring to use a false passport to reenter the United States after his arrest in Ajman. Hernandez was acquitted of the passport charge.

The jurors know nothing about the Ajman bank or the passport acquittal.

But, the 12 jurors learned about the passport case during defense questioning of David Masnada, an attorney, now living in Spain, who once worked for WFC.

Masnada was holding a passport for Hernandez when the WFC head was arrested in Ajman. Masnada later gave the passport to the FBI and received immunity from prosecution.

Masnada said Hernandez asked him to validate the passport. "It would have been illegal," he said.

"But, you destroyed papers and didn't pay taxes," said attorney Robert Josefsberg.

Gonzalez prevented Strother from questioning Masnada in detail about the alleged Ajman bank fraud.

Defense attorney Block questioned former WFC official Fernando Capablanca, who managed WFC's bank in Costa Rica, about another bank fraud.

"Wasn't it necessary to pay commissions that were disguised as loans" to Latin American officials to receive bank charters, Block asked.

"I don't know if I would agree," answered Capablanca.

Block suggested that WFC disguised a payoff in Costa Rica to a political leader as a loan. "That's not correct," said Capablanca. "That loan was to finance a newspaper."

The loan was never repaid, said Capablanca who left Costa Rica after the bank suffered $400,000 in losses.

Office-Supreme Court, U.S.
FILED
JUL 24 1985
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CLERK

No. 84-1459

In the Supreme Court of the United States

OCTOBER TERM, 1985

GUILLERMO HERNANDEZ-CARTAYA AND
FRANCISCO J. FERNANDEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether counsel for a co-defendant commented in his closing argument on petitioners' silence at trial.

2. Whether the jury instructions properly informed the jury of the government's burden of proof.

3. Whether the district court abused its discretion by refusing to conduct a voir dire of the jury on the question whether any of the jurors had seen a newspaper article relating to the trial that was published after the jury had begun its deliberations.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1459

GUILLERMO HERNANDEZ-CARTAYA AND
FRANCISCO J. FERNANDEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 747 F.2d 1390.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1984. A petition for rehearing was denied on January 15, 1985 (Pet. App. A18). The petition for a writ of certiorari was filed on March 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of a variety of offenses arising out of a scheme to defraud the United States. Both petitioners were convicted of conspiring to defraud the United States, in violation of

18 U.S.C. 371. Petitioner Hernandez-Cartaya was also convicted on one count of willful attempted tax evasion, in violation of 26 U.S.C. 7201; two counts of willfully subscribing to false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(1); and four counts of assisting others in the preparation of false and fraudulent federal tax returns, in violation of 26 U.S.C. 7206(2). Petitioner Fernandez was also convicted on three counts of willfully subscribing to false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(1). Petitioner Hernandez-Cartaya was sentenced to five years' imprisonment and was fined $15,000. Petitioner Fernandez was sentenced to three years' imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. A1-A14).

1. a. Petitioners were officers of WFC Corporation, a large financial organization headquartered in Miami, Florida, that is primarily engaged in the business of arranging international loans, chiefly to countries and corporations in Central and South America (Pet. App. A5; 6 R. 1033-1035; 7 R. 1440; 9 R. 1879-1886, 2091-2092; 10 R. 2340-2343; 11 R. 2749, 2910).[1] From 1973 through 1978, WFC Corporation was extremely successful, and each year petitioners and their co-defendants agreed to award sizeable cash bonuses to themselves and other key company officers (Pet. App. A5). Petitioners and their colleagues further agreed not to report these bonuses as compensation on their federal income tax returns and instructed other recipients not to report their bonuses as well (*ibid.*). Petitioners also arranged for the corporation's accounting records to conceal the payment of these bonuses, which amounted to more than $100,000 each year (*ibid.*).[2]

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[1]The statement of facts and the citations to the record are taken from the government's brief in the court of appeals.

[2]The method by which petitioners and their confederates agreed to provide each other with bonuses and to conceal these funds from the

b. Of the six defendants who stood trial in this case, only Henry Heitman, Jr., who was ultimately acquitted, testified at trial (Pet. App. A9). In his testimony, Heitman described his conversations with petitioner Hernandez-Cartaya in which he told petitioner that he wanted to receive his annual bonuses in nontaxable business perquisites or personal loans rather than in cash, and he related the type of perquisites and loans that he had received (*ibid.;* 12 R. 3197-3235; Gov't C.A. Br. 49-52). Following his testimony, the government and Heitman's co-defendants moved to prevent Heitman's counsel from commenting on the other defendants' failure to testify (Pet. App. A9-A10; 2 R. 311-317; 13 R. 3358). The district court granted the government's motion and instructed Heitman's counsel to limit his closing argument to the fact that Heitman had testified and to the contents of Heitman's testimony (13 R. 3449, 3452-3454; see Pet. App. A10). The court also advised Heitman's counsel that he could inform the jury that his client's testimony stood unrebutted, but could not maintain that the only other person who could have described the pertinent transactions was petitioner Hernandez-Cartaya, who had chosen not to testify (Pet. App. A10; 13 R. 3452-3454).[3] Heitman's counsel expressly agreed to follow the court's instructions (13 R. 3454). The defendants objected

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Internal Revenue Service is too elaborate to warrant reiteration in this brief; it is fully detailed in the government's brief in the court of appeals. Gov't C.A. Br. 14-40. A copy of that brief has been lodged with the Clerk of this Court.

[3]The court further instructed Heitman's counsel that (13 R. 3452-3454):

> You may make any comment you wish to make, but you may not comment upon the failure, directly, of any other Defendant to testify, and you may not comment indirectly to the degree — upon the failure of any other Defendant to testify so that it might prejudice the other Defendants in the presentation of their case.

to the court's ruling, arguing that even the limited comments permitted would constitute an indirect comment on their failure to testify (13 R. 3459-3460).

In his closing argument, Heitman's counsel followed the court's instructions and did not directly comment on the failure of any of the other defendants' to testify (Pet. App. A10). He did, however, comment extensively on Heitman's testimony, arguing that his client alone chose not to accept the annual WFC bonuses in an illegal form (*ibid.*). Neither petitioners nor their co-defendants objected to the argument by Heitman's counsel. The following day, however, Heitman's co-defendants moved for a mistrial on the ground that Heitman's counsel had indirectly commented on their failure to testify (14 R. 3888-3889). The district court denied the motion (14 R. 3889).

c. Before delivering its charge to the jury, the district court supplied each defense counsel with a typewritten copy of the court's proposed jury instructions (12 R. 3316-3317). Among those instructions was a standard charge describing the government's burden of proof. That charge provided that the government was required to prove the defendants' guilt beyond a reasonable doubt, but not beyond all possible doubt. The court's charge to the jury (15 R. 3903-3904) included that instruction describing the government's burden of proof (see Pet. 14).[4] But, in giving that instruction, according to the court of appeals (see page 9 note 7,

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[4]The charge provided that (Proposed Instructions at 3B; 12 R. 3317 (emphasis added)):

> Thus, while the Government's burden is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all *possible* doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

infra), the district court misspoke, erroneously substituting the word "reasonable" for the word "possible." However, the court instructed the jury on at least 19 other occasions during its charge that the government was required to establish each defendant's guilt beyond a reasonable doubt (15 R. 3904-3905, 3905, 3906, 3907, 3908 (twice), 3911, 3915, 3918-3919, 3922 (twice), 3924, 3926, 3927, 3928, 3930, 3931, 3932 (twice)). Moreover, the court also instructed the jury to " 'follow all of the Court's instructions as a whole' " and not " 'to disregard or give special attention to any one instruction' " (15 R. 3903-3904).

After retiring to deliberate, the jury sent the district court a note requesting a written copy of the court's jury charge (15 R. 3949-3950). The district court, after entertaining argument from defense counsel and the government on the jury's request (15 R. 3947-3950), agreed to provide the jury with a typewritten copy of the charge (15 R. 3551-3953). Petitioners did not ask the court to allow them to examine or proofread the typewritten charge before it was given to the jury; nor did petitioners ask the court for a copy of the typewritten charge that was actually submitted to the jury (Gov't C.A. Br. 99-100).

d. During the jury's deliberations, on Friday, July 3, 1981, a one-page article concerning the trial appeared on the third page of the local section of the *Miami Herald* (Ct. Exh. 8; Pet. App. A19-A23). The article generally described the evidence and events at trial (Pet. App. A19-A23), but it also reported a variety of rumors regarding WFC Corporation, such as an allegation that WFC was linked to Fidel Castro or, alternatively, to the CIA, that WFC was involved in drug trafficking, and that WCF was "a large-scale swindle" (*id.* at A22). The article also stated that no criminal charges had been filed for such matters, notwithstanding a wide-ranging investigation by a task force of agents from the Drug Enforcement Administration and Federal Bureau

of Investigation (*ibid.*). The article also noted that petitioner Hernandez-Cartaya had been arrested in Ajman, Saudi Arabia, before being arrested in Miami, that Saudi Arabian officials claimed that a bank operated by WFC was missing more than $30 million, and that Hernandez-Cartaya had been acquitted of conspiring to use a false passport to reenter the United States following his arrest in Saudi Arabia (*ibid.*). Lastly, the article quoted from two of the district court's rulings at trial as well as a comment that the court had made on the government's proof after the jury had retired to deliberate (*id.* at A20). On the next day that court was in session (the following Monday) the defendants asked the district court to voir dire the jurors separately to determine whether they had read or were aware of the article. The court said that it would defer ruling on the defense motion until the court had read the article and would issue its ruling later that day. That afternoon, the court denied the request (16 R. 3968, 3970).

2. The court of appeals affirmed petitioners' convictions (Pet. App. A1-A14). After conducting "a careful study of the closing argument" (*id.* at A10), the court found that "in only one instance did Heitman's attorney even come close to commenting indirectly on the [petitioners'] failure to testify at trial, and in this instance the statement was not of such character that the jury would take it to be a comment on" petitioners' silence. The one exception, the court noted (*id.* at A10-A11), concerned the statement by Heitman's counsel that the district court would instruct the jury, in considering Heitman's guilt, to " 'bear in mind' " that Heitman had explained " 'in detail every facet of what he did, did not do, or did know or didn't know' " and had " 'subjected himself to the rigors of the power of our government's cross examination * * *.' " That statement, the court held (*id.* at A11-A12), was not manifestly intended as a comment on the failure of Heitman's co-defendant's to testify and would not have been viewed as such by the jury.

The court also rejected petitioners' argument that the jury had been misinformed as to the government's burden of proof (Pet. App. A6-A9). The court concluded that the charge, when viewed as a whole, clearly informed the jury that the government was required to prove petitioners' guilt beyond a reasonable doubt (*id.* at A8-A9). The court noted (*id.* at A8) that the district court had correctly instructed the jury on this matter on at least 19 different occasions during its charge and that the district court, when addressing the particular statutes petitioners were alleged to have violated, told the jury that the government was required to establish petitioners' guilt beyond a reasonable doubt on those charges. The court also observed (*id.* at A9) that none of the six defense counsel had objected to the jury charge either during or after its presentation. The court thus held that the district court's isolated misstatement could not have misled the jury as to the correct burden of proof (*ibid.*).

Finally, after reviewing the evidence and the *Miami Herald* article, the court also held (Pet. App. A12-A13) that the district court had not abused its discretion by declining to conduct a voir dire of the jury to determine whether any of its members had read or heard of the article. Most of the information contained in the article had been received in evidence at trial, the court noted (*id.* at A13), and the remainder did not relate to the charges against the defendants (*ibid.*). Moreover, given the district court's specific instructions to the jurors not to read or listen to media accounts of the trial, which the jurors were presumed to have followed, the likelihood that the jurors had read the article was small (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The court of appeals simply applied

well-settled legal principles to the facts of this particular case. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

1. Petitioners argue (Pet. 15-17) that counsel for co-defendant Heitman improperly referred during his closing argument to their decision not to testify at trial. Petitioners do not object to the standard applied by the court of appeals to determine whether permitting those remarks was erroneous;[5] rather, petitioners simply challenge the court of appeals' application of that test to the particular facts of this case. However, both the district court (14 R. 3888-3889) and the court of appeals (Pet. App. A11-A12) found that the statements by Heitman's counsel were not an indirect comment upon petitioners' silence. Given these concurrent findings by the lower courts, review by this Court of petitioners' fact-bound claim is unwarranted. See, *e.g., United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8.[6]

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[5]The test applied by the court of appeals—whether the statements were manifestly intended to be, or were of such character that a jury would naturally and necessarily take them to be, a comment upon petitioners' silence (Pet. App. A11)—has been adopted by every federal court of appeals. See *Butler* v. *Rose*, 686 F.2d 1163, 1170 & n.6 (6th Cir. 1982) (en banc) (collecting cases).

[6]In any event, the court of appeals correctly rejected petitioners' claim. To begin with, petitioners did not object to the statements they now challenge until the day after the closing argument by Heitman's counsel (14 R. 3888-3889). Petitioners therefore cannot prevail unless permitting those remarks amounted to plain error. See *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 12-15; *United States* v. *Frady*, 456 U.S. 152, 163 (1982). No such error occurred in this case.

As the court of appeals found (Pet. App. A10), the remarks by Heitman's counsel, with one exception, did not approach being an indirect comment upon petitioners' silence, and that exception was not likely to be perceived as such by the jury. Heitman's counsel merely commented on his client's testimony, such as his client's desire to receive perquisites and loans, rather than cash (14 R. 3709-3710, 3725-3741), and the government's failure on cross-examination to elicit any damaging admissions from his client (14 R. 3725-3736, 3741-3743). Contrary

2. Petitioners contend (Pet. 13-14) that the district court erred by submitting to the jury a transcript of the court's oral jury instructions that contained a misstatement of the government's burden of proof. As noted above (pages 4-5), the error resulted in the substitution of the word "reasonable" for the word "possible" in connection with the court's description of the government's burden of proof. Petitioners claim that this error allowed the jury to find that petitioners had committed the charged offenses without being convinced of their guilt beyond a reasonable doubt. That claim lacks merit.[7]

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to petitioners' claim (Pet. 7, 15), Heitman's counsel did not attempt to distinguish his client from petitioners or their other co-defendants on the ground that Heitman alone had testified. Rather, as the court of appeals observed (Pet. App. A12), "the remarks made by Heitman's attorney were clearly intended to point out that Heitman did not wish to receive cash bonuses and that the government's evidence and cross examination had failed to refute Heitman's testimony * * *." It is most unlikely that the jury would have viewed these remarks as a reference to petitioners' silence. Furthermore, the district court instructed the jury that " 'no inference whatever may be drawn from the election of a defendant not to testify' " (15 R. 3904-3905). It is well settled that the jury is presumed to follow the court's instructions. See *Carter* v. *Kentucky*, 450 U.S. 288, 302-303 n.20 (1981); see also *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5 & n.6. Indeed, the jury acquitted two of petitioners' co-defendants who also did not testify (see 18 R. 4015-4017), which demonstrates that the jury did not base its determinations on a defendant's decision to remain silent. See *United States* v. *Young*, slip op. 17 n.15.

[7]We note that there is some doubt as to whether the jury was in fact erroneously instructed on this matter. In the court of appeals, petitioners argued that the district court had correctly instructed the jury and the court reporter had erred in transcribing the court's jury charge. See Hernandez-Cartaya C.A. Br. 39-44; Fernandez C.A. Br. 14-22. The government argued that it was unclear from the record whether (1) the district court had given the correct instruction and the court reporter had incorrectly transcribed the instruction or (2) the district court had misspoken and the court reporter correctly transcribed what the district court had said. Gov't C.A. Br. 97-100. Moreover, we argued in the court of appeals that there was no evidence that the transcript containing the

It is well settled that a single jury instruction may not be considered in isolation, but must be viewed in the context of the overall charge and the entire record of the trial. See *Henderson* v. *Kibbe,* 431 U.S. 145, 152, 153-156 (1977); *United States* v. *Park,* 421 U.S. 658, 674-676 (1975); *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973). Petitioners do not claim that the district court's oral jury instructions were erroneous; on the contrary, petitioners themselves readily acknowledge (Pet. 14) that "there is absolutely no evidence of record that the trial court's oral charge misstated the burden of proof." Moreover, as the court of appeals pointed out (Pet. App. A8), the district court correctly stated on at least 19 different occasions during its charge that the government was required to prove beyond a reasonable doubt that each defendant was guilty (15 R. 3904-3905, 3906, 3907, 3908 (twice), 3911, 3915, 3918-3919, 3922 (twice), 3924, 3926, 3927, 3928, 3930, 3931, 3932 (twice)). The district court also made it clear that the evidence on each count must prove beyond a reasonable doubt that petitioners had committed the charged offense (Pet. App. A8). Indeed, in instructions given side-by-side with the one that petitioners challenge (*id.* at A7), the district court clearly stated the correct burden of proof. And the court's charge that no one instruction could be considered in isolation plainly reinforced these earlier, correct statements of the law (15 R. 3903-3904). Accordingly, it would be unrealistic to conclude that the jury fastened upon a single erroneous charge and was thereby misled into believing that a

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erroneous charge was the copy that was in fact given to the jury (*ibid.*). At trial, none of the defendants asked to proofread the transcript; nor did they seek to obtain a copy of those instructions. The court of appeals, however, assumed that the erroneous charge had been delivered orally and that the transcript submitted to the jury contained the erroneous jury instruction. Pet. App. A7-A9. Because petitioners' claim must fail in any event, it is unnecessary to determine who is correct on this score.

lesser burden of proof was required. See *United States* v. *Vasilaky*, 168 F.2d 191 (2d Cir. 1948); see also *United States* v. *Walsh*, 627 F.2d 88, 92-93 (7th Cir. 1980); *United States* v. *Pepe*, 501 F.2d 1142, 1144 (10th Cir. 1974); *Hoover* v. *United States*, 358 F.2d 87, 88 (5th Cir. 1966), cert. denied, 385 U.S. 822 (1966).[8]

3. Petitioners argue (Pet. 8-13) that the district court erred in refusing to conduct a voir dire of the jury to determine whether any jurors had read a newspaper article relating to the trial that was published after the jury had begun its deliberations. That fact-bound claim does not warrant further review.

It is well settled that the district court "has substantial discretion in deciding whether allegations [of prejudice affecting the jury's verdict] are of sufficient substance to require investigation and, if so, how the investigation should be conducted." 3 C. Wright, *Federal Practice and Procedure: Criminal* § 554, at 261-262 (1982) (footnote omitted). The publication of a newspaper article that relates to an ongoing trial does not invariably require a voir dire of the jury to determine whether the jurors have read the article and, if so, have been influenced by its contents. Rather, the courts of appeals have recognized that a district court is not required to interrogate the jury about publicity concerning a trial unless the material goes beyond the record on which the case is to be submitted to the jury and

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[8]None of the cases cited by petitioners are to the contrary. See, *e.g.*, *Dunn* v. *Perrin*, 570 F.2d 21, 24-25 (1st Cir.), cert. denied, 437 U.S. 910 (1978) ("reasonable doubt" defined erroneously three times and in a manner that shifted the burden of proof to the defendant); *United States* v. *Corrigan*, 548 F.2d 879, 883-884 (10th Cir. 1977) (self defense instruction shifted burden of proof to defendant or lightened government's burden of proof); *Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966) (confusing jury charge on burden of proof relating to entrapment).

raises serious questions of possible prejudice to the defendant. See, *e.g.*, *United States* v. *Herring*, 568 F.2d 1099, 1104 (5th Cir. 1978); *United States* v. *Lord*, 565 F.2d 831, 838 (2d Cir. 1977); *United States* v. *Perrotta* 553 F.2d 247, 249-250 (1st Cir. 1977); *United States* v. *Jones*, 542 F.2d 186, 194-195 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *Gordon* v. *United States*, 438 F.2d 858, 872-873 & nn.43-44 (5th Cir.), cert. denied, 404 U.S. 828 (1971); see also *United States* v. *Taylor*, 569 F.2d 448, 454 (7th Cir.), cert. denied, 435 U.S. 952 (1978); *United States* v. *Abascal*, 564 F.2d 821, 833-834 (9th Cir. 1977), certs. denied, 435 U.S. 942 and 953 (1978). In addition, the court may decline to question the jury if there is no reasonable likelihood that prejudicial material has reached the jury, such as where the allegedly-prejudicial article "was published in a relatively obscure manner" (*United States* v. *Herring*, 568 F.2d at 1105; accord, *United States* v. *Jones*, 542 F.2d at 194; *United States* v. *Lord*, 565 F.2d at 838; cf. *United States ex rel. Doggett* v. *Yeager*, 472 F.2d 229, 239 (3d Cir. 1973), disapproved on other grounds, *Murphy* v. *Florida*, 421 U.S. 794 (1975)).[9] The initial determination whether publicity contains material outside the record raising serious questions of possible prejudice and whether the publicity was likely to have reached the jury is largely committed to the trial court's discretion. See *United States* v. *Jones*, 542 F.2d at 194; *United States* v. *Perrotta*, 553 F.2d at 250; *Gordon* v. *United States*, 438 F.2d at 872-873; see also *United States* v. *Abascal*, 564 F.2d at 833; cf. *United States* v. *Chiantese*, 582 F.2d 974, 978-980 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979).

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[9]The cases cited by petitioners (Pet. 11 n.9) do not hold that the mere possibility that jurors have been exposed to prejudicial publicity is enough to require the court to conduct a voir dire of the jurors.

In this case, the court of appeals correctly held that the district court did not abuse its discretion by declining to question the jury regarding the article. The court of appeals found that (Pet. App. A13) "[m]ost of the information contained in the article did not go beyond the record as developed at trial." It is unnecessary to question the jury where a newspaper article does not reveal information not already before the jury. See, *e.g., United States* v. *Herring,* 568 F.2d at 1104; cf. *Murphy* v. *Florida,* 421 U.S. 794, 800 n.4 (1975). Moreover, the article did not reveal that petitioners had previously been convicted for the same crimes; it did not disclose incriminating evidence, such as a coerced confession, that the court had suppressed from evidence; it did not allege that petitioners had threatened a government witness; and it did not speculate as to petitioners' guilt or innocence or discuss the merits of any defense they had asserted. Factors such as these have commonly been present in cases in which the courts of appeals have held that a district court should have conducted a voir dire of the jury. See, *e.g., United States* v. *Herring,* 568 F.2d at 1104-1105; *United States* v. *Lord,* 565 F.2d at 838.[10]

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[10]None of the vast number of cases cited by petitioners conflicts with the decision in this case. For instance, this was not a case where the trial proceedings themselves were infected by prejudicial conduct. See, *e.g., Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). The article did not assert that petitioners had previously been convicted of the same offenses under consideration, but that their convictions had been reversed on appeal. See, *e.g., United States* v. *Attell,* 655 F.2d 703, 704-705 (5th Cir. 1981); *United States* v. *Williams,* 568 F.2d 464, 466 (5th Cir. 1978). There was no allegation that petitioners had harmed or threatened a government witness. See, *e.g., United States* v. *Herring, supra; United States* v. *Lord, supra.* The article did not state that petitioners had previously been convicted of a crime or that petitioners had been accused of any offense other than those of which the jury was already aware. See, *e.g., Marshall* v. *United States,* 360 U.S. 310, 311-313 (1959); *United States* v. *Trapnell,* 638 F.2d 1016, 1021-1022 (7th Cir. 1980). See page 14 note 11, *infra.* Moreover, the article did not refer to any actions taken by petitioners or others involved in the crimes at issue

Petitioners claim (Pet. 11) that they were prejudiced by "the revelation of unflattering information * * * unrelated to the specific charges" against them. But much of this information was brought out by the defense at trial, often during cross-examination of government witnesses.[11] The

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that were inconsistent with petitioners' claim of innocence. See, *e.g.*, *Goins* v. *McKeen*, 605 F.2d 947, 949-954 (6th Cir. 1979); *United States* v. *Pomponio*, 517 F.2d 460, 462-463 (4th Cir.), cert. denied, 423 U.S. 1015 (1975).

[11]For example, the article stated (Pet. App. A20-A22) that petitioner Hernandez-Cartaya was a veteran of the Bay of Pigs; that the defendants, like several of the government's witnesses, shared certain privileges at WFC, such as "expense accounts, private loans, luxury cars and big salaries"; and that WFC was rumored to be "linked" to the CIA, to Fidel Castro, or to drug trafficking, and that "WFC was a large-scale swindle." However, it was no secret to the jurors that petitioner Hernandez-Cartaya was a veteran of the Bay of Pigs (10 R. 2393; 12 R. 3196). Similarly, the jury was well aware of the large salaries and perquisites that the senior officers of WFC received (see, *e.g.*, 6 R. 987, 997, 1000-1004, 1016-1017, 1045-1046, 1132-1133; 7 R. 1216-1217, 1219-1243, 1317-1318, 1330-1340, 1348-1380; 8 R. 1791-1853; 9 R. 1969-2000, 2006, 2184; 10 R. 2373-2376, 2460-2466, 2497-2499, 2543-2545, 2558-2569; 11 R. 2687, 2701-2704, 2713-2716, 2807-2809, 2862-2865, 2870-2871; 13 R. 3402-3405, 3409-3410, 3419-3420). Indeed, much of the government's proof consisted of demonstrating that portions of the cash bonuses given to WFC senior officials were applied towards various loans that they had previously received (see, *e.g.*, 6 R. 1000-1010, 1019-1030; 7 R. 1219-1221, 1330-1340, 1348-1380; 8 R. 1691-1696; 9 R. 2100-2103; 10 R. 2455-2457, 2553-2555, 2559-2566; GX 49, 52, 53A-53C, 68-71, 80, 152, 163). In addition, one of petitioner Hernandez-Cartaya's character witnesses brought out petitioner's links to Cuba (12 R. 3291-3294), and the allegations reported in the *Miami Herald* that WFC was a "large-scale swindle" (Pet. App. A22) came out, as the article itself notes (*id.* at A23), during the cross-examination of a government witness by counsel for petitioner Fernandez (11 R. 2763-2765, 2773-2774). Indeed, the article specifically noted that allegations such as the last one were merely rumors and that no criminal charges had been filed. Thus, the article tended to discredit, rather than to reinforce, various allegations of possible wrongdoing.

Similarly, defense cross-examination elicited information regarding WFC's connections with the CIA (8 R. 1575-1576); certain bank frauds (9 R. 1908, 2049-2056, 2167-2168; 10 R. 2620; 11 R. 2771-2772, 2917; 12

article also expressly stated that most of the items cited by defendants as prejudicial were merely rumors and unproven allegations; the article itself thus contained a warning on its face regarding the truth of these items. Petitioners also argue (Pet. 10) that a quotation in the article from the district court could have misled the jury that the government need not prove that they had acted with criminal intent.[12] But the court repeatedly instructed the jury to the contrary (15 R. 3914, 3915, 3918, 3922, 3923, 3924, 3925, 3926, 3928, 3929, 3930, 3931, 3932). The jurors thus could not have been misled by this aspect of the article. Petitioners also claim (Pet. 4) that the article, by quoting the district court's finding that the government had proved that a conspiracy had existed, could have prejudiced the jury's consideration of the evidence.[13] But the district court carefully instructed the jury on numerous occasions that the government was required to prove its case beyond a reasonable doubt (pages 5, 10, *supra*). In any event, the district court is

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R. 3244-3245); phony passports (10 R. 2592-2606, 2620-2621); illegal commissions and political payoffs (6 R. 1035, 1038-1041; 7 R. 1440, 1447, 1465-1466; 9 R. 1879, 2027-2030; 11 R. 2763-2765); and various government investigations of WFC and its officers (see 9 R. 1894-1895, 1908-1913, 2049-2051, 2055-2056, 2168-2170; 12 R. 3244-3245). There was also testimony, again brought out primarily by the defendants, that petitioner Hernandez-Cartaya went to Ajman to resolve a dispute the WFC bank was having with that nation's government (9 R. 2167-2168; 10 R. 2592-2606, 2620-2621; 11 R. 2917-2918, 2921, 2923). Furthermore, the defense also brought out that Cartaya had escaped from Ajman using a phony passport (10 R. 2592-2606, 2620-2621).

[12]As support for this argument, petitioners rely upon a quotation in the article of a remark by the district court that " '[t]he government says that Mr. Cartaya received a bonus of $50,000 and he didn't report it. If you believe he got it, then he's guilty' " (Pet. App. A19-A20).

[13]The article stated (Pet. App. A21): "[Judge] Gonzalez ruled last Friday that 'there is substantial independent evidence of a conspiracy.' He refused to dismiss the conspiracy charges after [the prosecutor] ended prosecution testimony."

entitled to comment upon the evidence at trial (see *Quercia* v. *United States*, 289 U.S. 466, 469 (1933)), and the comment quoted here was unlikely to have caused petitioners prejudice. Beyond that, only one article was at issue, and it did not appear in a prominent location (*i.e.*, it appeared on the third page of the local section of the *Miami Herald*). Compare, *e.g.*, *United States* v. *Lord*, 565 F.2d at 838; *United States* v. *Perrotta*, 553 F.2d at 249.

Finally, the district court repeatedly instructed the jury not to listen to or read any media accounts of the proceedings (6 R. 899-901, 1210; 7 R. 1505; 8 R. 1861; 9 R. 2248-2249; 10 R. 2629-2630; 11 R. 2937-2938; 12 R. 3307; 13 R. 3641-3642; 14 R. 3887; 15 R. 3943, 3964; 16 R. 3971; 17 R. 4000; 18 R. 4007)[14] and to base its verdict " 'solely upon what you hear in this courtroom and not what somebody else says happened in the courtroom' "(6 R. 900; see also 13 R. 3461; 15 R. 3903-3904, 3461). These instructions further negated any realistic danger that the article could have prejudiced the jury. See, *e.g.*, *United States* v. *Herring*, 568 F.2d at 1105.[15] Accordingly, the court of appeals correctly held that the district court did not abuse its discretion by declining to voir dire the jury on this matter.[16]

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[14]The district court also instructed the jurors at the outset of trial not to read any newspaper article with a headline referring to a tax trial (6 R. 900).

[15]Petitioners err in asserting (Pet. 12) that a court's instructions to the jury to avoid reading about a pending trial may not be considered, along with an article's contents, in determining whether the jury should be questioned. While such instructions by themselves may not be sufficient to justify declining to question the jury, they are nonetheless a legitimate factor to consider. See *United States* v. *Herring*, 568 F.2d at 1104-1105; *Gordon* v. *United States*, 438 F.2d at 873-874; see also *United States* v. *Ricardo*, 619 F.2d 1124, 1132 (5th Cir.), cert. denied, 449 U.S. 1063 (1980).

[16]Moreover, we also argued in the court of appeals (Gov't C.A. Br. 92) that, given the overwhelming proof of petitioners' guilt, any error was harmless. See *United States* v. *Trapnell*, 638 F.2d at 1023-1024.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-1459

In the Supreme Court of the United States

October Term, 1985

GUILLERMO HERNANDEZ-CARTAYA,
FRANCISCO J. FERNANDEZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE TRIAL COURT'S REFUSAL TO VOIR DIRE THE JURY ABOUT A NEWSPAPER ARTICLE CONCERNING THE PETITIONERS.

II. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF A NEW TRIAL ON THE BASIS OF AN ERRONEOUS JURY INSTRUCTION SIGNIFICANTLY MISSTATING THE GOVERNMENT'S BURDEN OF PROOF.

III. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S REFUSAL TO GRANT A MISTRIAL ON THE BASIS OF REMARKS MADE BY A CO-DEFENDANT WHICH CONSTITUTED COMMENT UPON THE PETITIONERS' FAILURE TO TESTIFY AT TRIAL.

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No. 84-1459

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GUILLERMO HERNANDEZ-CARTAYA,
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vs.

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REPLY BRIEF OF PETITIONERS

STATEMENT OF THE CASE

We have no quarrel with the respondent's Statement of the Case, insofar as it describes the general factual and procedural context in which the issues on appeal arose. Several additional factual assertions, however, are made in the course of the respondent's argument, and many of them are simply wrong. We will address them in the course of our own argument.

ARGUMENT

I. The Newspaper Article. This point is discussed at pages 10-15 of the respondent's typewritten brief; we have not yet received a copy of its printed brief. As we indicated, the Court of Appeals assigned three reasons for upholding the trial court's refusal even to question the jurors about the offending article (A. 13). First, the court concluded that most of the information did not go beyond the record developed at trial. The respondent attempts to defend this conclusion in a long footnote at page 13 of its typewritten brief. The citations to the record are all lifted verbatim from the government's brief in the Court of Appeals (pp. 84-86), and these citations are no more relevant here than they were below. Before reviewing them, we should observe at the outset that the respondent makes no attempt to deny that at least six statements in the newspaper article were outside of the evidence heard at trial: that the WFC was involved in drug trafficking; that Cartaya was arrested in the Persian Gulf, and then again in Miami; that a WFC bank in an Arab country was missing more than $30,000,000.00; that Cartaya was actually charged with using a false passport; that the trial court thought there was substantial evidence of a conspiracy; and that the trial court thought that failure to report the bonuses would alone warrant conviction. Even if all of the other allegations in the article were known to the jury, these statements *alone* would have justified inquiry. But contrary to the respondent's representation to this Court, there was far more than that.

First—after pointing out that the jury did hear about Cartaya's experience at the Bay of Pigs, and about WFC expense accounts and luxury cars and salaries, which we

have acknowledged throughout the proceedings and about which we have raised no arguments—the respondent says that the jury also heard evidence about Cartaya's links to Cuba. We invite the Court to read the testimony cited (Tr. 3291-94), which says simply that Cartaya was a friend of a State Department officer in Havana in 1953. It does not even *hint* that Cartaya was linked to the CIA or to Fidel Castro, which was what the article reported. Second, the respondent contends that the jury knew that the WFC was alleged to be a large-scale swindle. But the testimony cited (Tr. 2763-65, 2773-74), suggests no such thing.[1] Third, the respondent cites a number of pages of the transcript for the proposition that the jury heard about "certain bank frauds." We invite the Court to read each and every one of the citations to the transcript provided. Not one of them even hints at any bank fraud, and there is simply no excuse for their citation to that effect.[2] Fourth, the respondent cites testimony through which the jury learned about Cartaya's use of a phony passport to get out of Ajman. We have never claimed otherwise; the article itself said that the jury knew about this. Fifth, the respondent cites testimony about various political pay-

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1. Part of that testimony discusses the charges of tax fraud which were the subject matter of the suit; part of it contains the highly-unsuccessful attempt by the prosecutor to get a witness to admit that he paid a bribe to an important official in Costa Rica; and part of it suggests that the WFC bank in Costa Rica went under because it was poorly managed. None of this testimony even hints that WFC was swindling anybody.

2. The only citation which even comes close is Tr. 2771-72, in which the prosecutor asks a witness if *that witness* had participated in any embezzling of proceeds of a loan from a European bank, and the witness answers "no." That is the end of the colloquy—and the suggestion comes in a question—not an answer—a question directed to a witness—not to Cartaya or to WFC. All of the other transcript cites offered by the respondent have no conceivable relevance to the introductory phrase "certain bank frauds."

offs by WFC in foreign countries. We have never claimed otherwise; the article itself mentioned that talk about "political payoffs" surfaced during the trial.

Sixth and finally, the respondent provides a long string of citations for the contention that the jury knew all about the "various government investigations of WFC and its officers . . . ." Mindful that the article expressly referred to FBI, Drug Enforcement Administration, Public Safety Department, and House narcotics subcommittee investigations of Cartaya and WFC, we ask this Court to review the transcript citations offered by the respondent (Tr. 1894-95, 1908-13, 2049-51, 2055-56, 2168-70, 3244-45). These passages mention only two government agencies—the IRS and the FBI. They do not even *hint* that the investigation of these two agencies involved anything other than the tax charges which were before the jury; indeed, the trial court scrupulously shielded the jury from any testimony about investigations beyond the charges at issue. And none of these citations contain any mention of the Drug Enforcement Administration, the Public Safety Department, or a House narcotics subcommittee. The respondent's introduction of these citations, with the representation that they concerned investigations in addition to those at issue before the jury, is indefensible. None of the cited testimony even *hinted* at the widespread government investigations—including drug investigations—reported in the article.

There can simply be no question that this article contained a substantial number of facts or allegations wholly outside of the evidence heard by the jury—including allegations of swindling and drug trafficking, and comments disclosing the trial court's belief in the defendants' guilt—which were overwhelmingly prejudicial to the petitioners.

We are happy to have the Court test that assertion against the citations to the transcript provided by the respondent.[3]

Second, the Court of Appeals concluded that the "[o]ther information [in the article] was unrelated to the charges for which the appellants were being tried." As we emphasized, that is precisely the point—and the respondent makes no attempt to defend this conclusion by the appellate court. As we also demonstrated, when the material at issue is prejudicial as a matter of law—that is, when there is simply no room for the exercise of any discretion by the trial court in concluding that the material in question is harmless—then the trial court has *no discretion* to decline a voir dire. The respondent, by its silence, concedes the point.

Third, the Court of Appeals relied upon the trial court's general boilerplate instructions to the jury. But as we emphasized, even a conscientious juror could have obeyed those instructions—not to read anything about the case or the trial—and still have read this article about the defendants and their company, and about unrelated accusations against them. The respondent offers no answer. Moreover, we also demonstrated that all of the courts to decide this question have held that boilerplate instructions are simply not enough—because juries ignore such instructions all the time. We agree with the respondent (page 15

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3. The respondent also argues that the article itself reported that some of the rumors were nothing more than rumors—and thus itself "contained a warning on its face regarding the truth of these items." We are content to have this Court decide for itself whether these allegations were helpful or harmful to the petitioners. The *fact* of various investigations—for swindling and drug charges—was reported. The *fact* of an accusation that one of WFC's foreign banks was missing $30,000,000.00 was reported. The *fact* of Cartaya's arrest for using a false passport was reported. And the other revelations, even if reporting only rumors, in no sense established that such rumors had proved to be false. This article was manifestly harmful to the petitioners.

of the typewritten brief, second footnote) that such instructions are "a legitimate factor to consider"—but that does not deny our point that no court has ever held such instructions to be dispositive in the face of significantly-prejudicial material.

We submit that the trial court manifestly abused its discretion in failing to recognize the inherently prejudicial nature of this newspaper article, and thus erred in failing to take the simple step of questioning the jurors about whether or not they had seen it. The respondent has said absolutely nothing to forestall that conclusion.

II. The Jury Instruction. The respondent discusses this point at pages 9-10 of its typewritten brief, pointing out that the jury charges must be considered as a whole. But under the authority cited in footnote 16 at page 14 of our petition, the trial court's various correct statements of the burden of proof were not enough to overcome the manifest prejudice of its misstatement of the burden of proof in the same charge. That charge told the jury that it could convict these defendants despite a reasonable doubt—and that was manifestly erroneous and manifestly harmful.

The Court of Appeals also commented that the defendants did not object to the charge when it was given orally. But as we pointed out, there is no way of knowing whether the oral charge was wrong—whether it was simply typed incorrectly and then given to the jury.[4] Moreover, as we

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4. In a footnote on page 9 of its typewritten brief, the respondent ascribes to us the assertion in the Court of Appeals that the District Court had given the correct charge orally but the reporter had transcribed it incorrectly. Here is what we said in our brief in the Court of Appeals (p. 7): "Of course, it is impossible to know for certain whether the trial court actually read that phrase to the jury, or whether the trial court gave a

(Continued on following page)

emphasized, even if the trial court had orally read the charge incorrectly as well as providing an incorrect written charge, the defendants' silence should not be dispositive in light of this fundamental constitutional error. Nothing could be more fundamental than an erroneous charge on the government's burden of proof in a criminal case—and the respondent has cited no authority to the contrary.

Footnote continued—

correct instruction, but the court reporter simply typed it wrong." And later in the same brief (p. 40): "Whether this erroneous instruction was given orally to the jury, or whether it was typed improperly after a correct instruction had been given orally to the jury, is impossible to determine from the transcript." The respondent has simply misstated our position. Likewise, the respondent has misstated its own position in the Court of Appeals, in stating that "[t]he government argued that it was unclear from the record whether" the oral charge was wrong, or simply the written transcription. In fact, the government's answer brief in the Court of Appeals (p. 48) expressly represented that the oral charge to the jury was correct. And again at page 101 of its brief in the Court of Appeals, the government asserted that "it is not disputed that the District Court correctly gave this instruction in its oral charge in all twenty places." Again, therefore, the respondent has mischaracterized both our position below, and its own.

Our position below was that because there was no way of determining whether the oral charge was correct or not, it would be inappropriate to preclude the defendants from asserting the error as a basis for reversal. And that is especially true in this case, in which the government represented in its answer brief that the oral charge given to the jury was correct. Since both parties were willing to accept that assumption, the only question before the appellate court was whether the submission of the erroneous written charge constituted reversible error.

Finally, in the same footnote, the respondent finds "no evidence that the transcript containing the erroneous charge was the copy that was in fact given to the jury"—only that the appellate court "assumed" that it was. That is incorrect. As we pointed out in the appellate court, the pages of the trial transcript containing the charge (Tr. 3903-35) are also consecutively numbered 1-33, and in addition are worn from handling by the jury. They are obviously the same pages which were provided to the jury. Three affidavits were submitted in the appellate court to sustain this position; they are attached to our reply brief, and they make clear beyond any doubt that the pages contained in the transcript are the pages which were provided to the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

GUILLERMO HERNANDEZ-CARTAYA AND FRANCISCO J. FERNANDEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In their reply brief, petitioners have asserted that we misstated the record in our brief in opposition to the petition for a writ of certiorari.

1. Most of petitioners' assertions relate to their point concerning the newspaper article that appeared after the jury retired to deliberate.

a. Petitioners first take issue (Reply Br. 2-3) with our statement (Br. in Opp. 14 n.11) that "one of petitioner Hernandez-Cartaya's character witnesses brought out petitioner's links to Cuba (12 R. 3291-3294) * * *." Petitioners contend (Reply Br. 3) that the cited testimony "says simply that Cartaya was a friend of a State Department officer in Havana in 1953." But the testimony goes beyond that. The witness testified that he had been assigned to the United

States embassy in Havana as a political officer in January 1953 and was there until November 1953 (12 R. 3292). He further testified (*ibid.*) that he became friends with petitioner and his family early in his (the witness') tour and that he had had occasion to seek advice and information from petitioner about the trends of Cuban political figures and political parties (*id.* at 3292-3293). Moreover, petitioners have acknowledged that "the jury did hear about Cartaya's experience at the Bay of Pigs" (Reply Br. 2). As petitioners point out (Reply Br. 3), the above-cited testimony does not suggest that Hernandez-Cartaya was linked to the CIA or to Fidel Castro. We did not say that it did. As for a CIA link, however, it should be noted that defense counsel cross-examined prosecution witness Carlos Fernandez about whether Eduardo Martinez, an employee of WFC (8 R. 1560), had any association or relationship with the CIA (8 R. 1575-1576). Although the witness denied having any personal knowledge of this matter,[1] the possibility of a CIA link was mentioned before the jury at trial.

---

[1]Q. Going back to Eduardo Martinez, do you have any personal knowledge whetheror [*sic*] not he had any association or relationship with the CIA during the time he worked for WFC or at any time?

A. I think Eduardo Martinez, from what I heard, and this is just from what I head [*sic*] —

MR. STROTHER: Objection, Your Honor, as to hearsay.

THE COURT: Sustained.

BY MR. MEADOWS:

Q. Do you know of your own personal knowledge, Mr. FErnandez? [*sic*]

A. No. I don't. I don't know. I mean, I don't see a badge saying CIA.

Q. Pardon?

A. I don't see a badge saying CIA. I don't know.

MR. MEADOWS: Thank you.

8 R. 1576.

b. Petitioners next assert (Reply Br. 3) that, contrary to our statement (Br. in Opp. 14 n.11), the trial testimony (11 R. 2763-2765, 2773-2774) does not suggest that WFC was a "large-scale swindle."[2] The first citation is to the testimony of Fernando Capablanca. Although he did not admit that WFC had paid a bribe disguised as a loan to an influential Costa Rican (a former president of that nation), the jury could have readily inferred from his testimony that such a payment had been made. The second citation is to Capablanca's testimony on cross-examination that he had managed the WFC bank in Costa Rica for about 18 months, that his management of the bank was successful "[t]o some extent," and that the bank had closed its doors after losing $400,000 dollars (11 R. 2773). He denied that the loss had anything to do with the management of the bank, and the following transpired (*id.* at 2773-2774):

> Q. I see. It wasn't your fault that the bank you were managing closed its doors and lost $400,000?
>
> A. The bank was owned, sir, by WFC Corporation and by another bank in Miami.
>
> Q. As a matter of fact, when you came back to Costa Rica, you were then a fallen star in the company, weren't you?
>
> A. I don't recall that at all, sir.
>
> Q. As a result of the debacle of the disaster of the Coasta [*sic*] Rican bank, you were sort of shunted aside, weren't you?
>
> A. Not really, sir.

---

[2] In pressing this argument, petitioners themselves err by characterizing (Reply Br. 3 n.1) part of that testimony as a "highly-unsuccessful attempt by the prosecutor to get a witness to admit that he paid a bribe to an important official in Costa Rica * * *." The testimony was not elicited by the prosecutor, but by defense counsel during cross-examination of Fernando Capablanca (11 R. 2764-2765).

Thus, the cross-examination of Capablanca suggested that WFC had engaged in dishonest practices and that the failure of the Costa Rican bank may have been due to more than simple mismanagement.[3]

c. Petitioners next challenge the citations supporting our statement that the defense elicited information regarding certain bank frauds.

The newspaper article referred specifically (and briefly) to only two bank frauds—one involving the WFC bank in Costa Rica and the other involving a WFC bank in the Arab Emirate of Ajman (Pet. App. 22a-23a). With respect to the former (*id.* at A23), the article simply described the portion of the cross-examination of Capablanca discussed above concerning whether WFC had paid a bribe disguised as a loan to a political leader in Costa Rica. References to the WFC bank in Ajman (9 R. 2167-2168; 10 R. 2620; and 11 R. 2917), which we cited, provided the following. Eli Tourgeman, a former employee of WFC (9 R. 2117-2118), testified on defense cross-examination (9 R. 2167-2168) that, in June 1977, petitioner Hernandez-Cartaya was in Ajman trying to work out some financial problems that had arisen with the government of that country in connection with the bank there. David Masnata, a former chief of the legal department at WFC Corporation (10 R. 2537), testified that the Ajman authorities had taken Hernandez-Cartaya's passport because "[t]hey were unhappy with him" (10 R. 2620). Fernando Capablanca, whom Hernandez-Cartaya left in charge of the administrative activities of WFC while he was in Ajman (11 R. 2918), testified on cross-examination that Hernandez-Cartaya had gone to

---

[3]Furthermore, this case was about a "large-scale swindle" — the attempt by WFC and its officials fraudulently to deprive the United States of tax revenues. The newspaper article did not expressly identify any particular activities as the swindle.

Ajman to try to resolve difficulties the bank was having with the government of that country (11 R. 2917). Capablanca further testified that while Hernandez-Cartaya was in Ajman, he (Capablanca) was asked to be president of the company (11 R. 2919) and that he "was of the opinion that he [Hernandez-Cartaya] might have some difficulties getting out of Ajman" (11 R. 2921). Thus, there was a suggestion before the jury that the bank had not merely suffered financial reverses.

Other portions of the record that we cited state the following. An FBI special agent testified that, in connection with his assisting a grand jury investigation of WFC and petitioner Hernandez-Cartaya, he went to Panama and examined records of the WFC bank there concerning WFC and petitioner Hernandez-Cartaya (9 R. 2049-2056). Earlier, Angel Marichal, who had been director of internal audits and, later, comptroller of WFC (8 R. 1662), was under cross-examination. While with WFC, his duties included reviewing the financial statements and accounting of banks owned by WFC, including a bank in Panama (8 R. 1662; 9 R. 1881-1882). Marichal was asked by a defense counsel (9 R. 1908), "Did you, in January, 1978, tell him [Gustavo Manci Mondai] that you were asked by the FBI whether while you were working for the corporations any of the corporations had violated any of the regulations, and did you tell him that you responded in the negative, that to your knowledge, no, none of the companies violated any of the Federal regulations?" Marichal replied that he could not remember the name, interview, or date, but affirmatively responded to the question whether "it may have happened and it may have not?" (*ibid.*). Defense counsel had previously asked Marichal, "Have you told the FBI that WFC and its affiliates and subsidiaries had not violated any Federal regulations?" (9 R. 1907). Marichal answered that he could not recall saying that and that "I cannot deny it or affirm it" (*ibid.*). Hence, although the agent did not identify

the types of possible offenses under investigation, his testimony, together with the cross-examination questions to Marichal about FBI inquiries on whether WFC had violated federal regulations, suggested that the FBI and the grand jury were investigating possible violations of banking regulations by WFC, which, of course, could have amounted to bank fraud.

The possibility of bank fraud was also suggested by the testimony of defendant Henry Heitman during cross-examination (12 R. 3244-3245) that we cited. Heitman testified on direct examination that from the end of July 1976 until February 1977, he was employed by a bank owned by petitioner Hernandez-Cartaya (12 R. 3210-3211, 3220). At the pages we cited, Heitman testified that in February 1977, when he returned to WFC, the bank was under examination by bank examiners.

d. Finally, petitioners assert (Reply Br. 4) that we provided "a long string of citations for the contention that the jury knew all about the 'various government investigations of WFC and its officers . . . .' " We made no such contention; we simply stated that "defense cross-examination elicited information regarding * * * various government investigations of WFC and its officers" (Br. in Opp. 14-15 n.11). Furthermore, while petitioners are correct that the portions of the transcript we cited do not refer to investigations by the Drug Enforcement Administration, the Public Safety Department, and the House Narcotics Subcommittee (and we did not say that they did), petitioners are incorrect in asserting that the cited portions "do not even *hint* that the investigation of these two agencies involved anything other than the tax charges which were before the jury" (Reply Br. 4 (emphasis in original)). As discussed above, some of the references to FBI inquiries suggested that bank frauds, as well as tax offenses, were under investigation by the FBI and by bank examiners (pages 5-6, *supra*).

2. Petitioners also contend (Reply Br. 6-7 n.4) that we misstated their position in the court of appeals regarding the jury instruction on the government's burden of proof. We stated (Br. in Opp. 9-10 n.7), "In the court of appeals, petitioners argued that the district court had correctly instructed the jury and the court reporter had erred in transcribing the court's jury charge." In challenging this statement and setting out what they said in their brief, petitioners omit the following sentence: "The appellants contend that the instruction was *read* correctly, but *typed* incorrectly, though we cannot prove it" (Hernandez-Cartaya C.A. Br. 40 (emphasis in original)). This sentence immediately follows the quotation from page 40 of petitioner Hernandez-Cartaya's court of appeals' brief cited by petitioners.[4]

Petitioners also assert that we mischaracterized our argument to the court of appeals. On reexamination, it appears that we misconstrued a passage in our brief (at 99); it now appears that our court of appeals' brief simply accepted the defendants' contention that the district court correctly delivered the instruction at issue and that the reporter transcribed it incorrectly.[5] We regret this error and assure the Court that we did not intend to be misleading;

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[4]Similarly, petitioners have also omitted the following sentence from page 7 of petitioner Hernandez-Cartaya's court of appeals brief: "It is the recollection of the counsel for the three appellants that the court actually gave a correct charge, but of course that recollection cannot be verified." This sentence immediately follows the quotation from page 7 of petitioner Hernandez-Cartaya's court of appeals' brief cited by petitioners in their reply brief (at 6-7 n.4).

[5]The statements in our court of appeals' brief to which petitioners point (Reply Br. 7 n.4) — that the district court orally gave a correct instruction (Gov't C.A. Br. 48) and that it was not disputed that the district court had correctly charged the jury on the burden of proof 20 times (Gov't C.A. Br. 101) — referred to the petitioners' briefs in the court of appeals.

indeed, we lodged a copy of our brief with the Clerk of this Court. Finally, we acknowledge that, as petitioners point out, petitioner Hernandez-Cartaya's reply brief in the court of appeals provided some evidence to support his argument that the erroneous transcript was given to the jury. In any event, our argument was (Br. in Opp. 10 n.7) that petitioners' claim must fail regardless of what actually happened at trial.

Respectfully submitted.

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Thus, the Court of Appeals erred in concluding that the manifest error of this charge was harmless simply because the charge was stated correctly at other times.

III. The Co-Defendant's Closing Argument. The respondent addresses this point at pages 7-8 of its typewritten brief. The curious answer is that this Court should deny the writ because both the trial court and the appellate court held that the closing comments by Heitman's counsel did not constitute an indirect comment upon the petitioners' silence: "Given these concurrent findings by both lower courts, review by this Court of petitioners' fact-bound claim is unwarranted" (typewritten brief at 8). And in a footnote on the same page, the respondent simply quotes several of the appellate court's conclusions about these various comments.

Even if the conclusions of the trial court and the appellate court on this issue had been purely "fact-bound" in nature, this would be a novel approach to the question. Even this Court might review factual conclusions if clearly erroneous. But there are no factual disputes on this issue—since Heitman's closing argument is on the record. The question is whether that argument—as a matter of law—was reversible error because it constituted an indirect comment upon the other defendants' unwillingness to take the stand. That is a question of law, and there can be no better proof of that than the dozens of cases cited on this issue by both sides. In every one of them, the appellate court undertook *de novo* to determine whether the comments at issue reflected the intention or the natural and necessary effect of commenting upon the failure of a defendant to take the stand.

Incredibly, the respondent chooses not to argue that question, and thus we rest with the contentions raised

in our initial petition. As we demonstrated, Heitman attempted to do two things in his closing argument—to point out that he was different from all of the other defendants because he had testified; and to point out that his testimony was uncontradicted, because it concerned private conversations with Cartaya which *only* Cartaya was in a position to deny. Both of those attempts naturally and necessarily called the jury's attention to Cartaya's failure to take the stand. The respondent does not even attempt to deny that obvious conclusion, and thus the error of the Court of Appeals' holding on this point.

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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